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In the Supreme Court of the United States

OCTOBER TERM, 1973

CASPAR W. WEINBERGER, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

SANTIAGO DIAZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion of the district court (App. A, *infra*) is reported at 361 F. Supp. 1.

JURISDICTION

The judgment of the district court (App. B, *infra*) declaring unconstitutional, and enjoining enforcement of, portions of 42 U.S.C. 1395o(2)(B)[1] was entered on August 7, 1973. A notice of appeal to this Court (App.

[1] During the pendency of the district court action, 42 U.S.C. 1395o(2)(A) (i) and (ii), the provision then in effect, was redesignated 42 U.S.C. (Supp. II) 1395o(2)(B) and amended in an immaterial respect. Throughout, we shall refer to the provision which is currently in effect.

C, *infra*) was filed on September 5, 1973. The time for the docketing of the appeal was extended by order of Mr. Justice Powell to January 3, 1974. The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

QUESTIONS PRESENTED

1. Whether the five-year durational residence requirement for alien eligibility in the Medicare supplemental insurance program, 42 U.S.C. 1395o(2)(B), is consistent with the Fifth Amendment.

2. Whether the "lawfully admitted for permanent residence" requirement for alien eligibility in the Medicare supplemental insurance program, 42 U.S.C. 1395o(2)(B), is severable from the durational residence requirement and consistent with the Fifth Amendment.

STATUTE INVOLVED

42 U.S.C. (Supp. II) 1395o provides:

> Every individual who—(1) is entitled to hospital insurance benefits under part A, or (2) has attained age 65 and is a resident of the United States, and is either (A) a citizen or (B) an alien lawfully admitted for permanent residence who has resided in the United States continuously during the 5 years immediately preceding the month in which he applies for enrollment under this part,
>
> is eligible to enroll in the insurance program established by this part.

STATEMENT

Appellees are Cuban refugees 65 years of age or older. (App. A, *infra*, p. 20). Appellees Diaz and Clara were paroled into the United States by the Attorney

General, and pursuant to 8 U.S.C. 1182(d)(5) remain here at his discretion. Appellee Espinoza has been lawfully admitted for permanent residence, but like Diaz and Clara has not yet resided in the United States continuously for five years.

In 1972, appellees Diaz and Clara applied to the Department of Health, Education, and Welfare, Social Security Administration, for enrollment in the Medicare Part B supplemental medical insurance program for the aged, an insurance program which covers a substantial part of the cost of physicians' services, home health care, diagnostic tests, and medical appliances. 42 U.S.C. 1395j, *et seq.* The program, which is supplemental to Medicare's Part A hospital insurance plan, is financed in equal parts by the United States and by monthly premiums paid by individuals aged 65 or older who choose to enroll. 42 U.S.C. 1395r(b).

The applications of Diaz and Clara were administratively denied for failure to meet the alien residency requirements of 42 U.S.C. 1395o(2)(B).[2]

Diaz, later joined by Clara and Espinoza,[3] instituted the present action in the district court on behalf

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[2] These facts are set forth in the Plaintiff's Memorandum in Support of Summary Judgment served December 11, 1972, and the affidavits of Diaz, Clara, and Manuel Levine.

[3] Following the filing of the suit, Espinoza applied for enrollment in the Part B Medicare program. It was stipulated that his application would be administratively denied for failure to meet the durational residency requirement of 42 U.S.C. 1395o(2)(B).

of himself and all persons in the United States who have been or will be denied enrollment in the Part B Medicare program by reason of their inability to meet the citizenship and residency requirements of 42 U.S.C. 1395o(2)(B). He sought injunctive relief against enforcement of the alien residency requirements of the statute, and a declaratory judgment that those restrictions violate the Due Process Clause of the Fifth Amendment in denying supplemental medical insurance benefits to aliens who do not meet the residency tests, while providing such benefits to citizens.

On cross-motions for summary judgment and appellant's alternative motion to dismiss, the district court first held that appellees' suit was not barred for failure to pursue administrative appeals (App. A, *infra*, pp. 14–16). On the merits and limiting the class action to immigrants over the age of 65, the court held that the Act is unconstitutional under the Due Process Clause, insofar as it denied Part B Medicare benefits to immigrant aliens for failing to meet a durational residency requirement which is not imposed on United States' citizens (App. A, *infra*, p. 33). The court further held, after expressing doubts as to its constitutionality, that the permanent residence requirement of the Act was not severable from the durational residence requirement (App. A, *infra*, pp. 33–38).

The court questioned whether the exclusion of aliens effected by the durational residence test could be justified by a congressional purpose to preserve fiscal

integrity in view of the fact that half the cost of the Part B Medicare program is financed through premiums paid by those who choose to enroll. In any event, the court concluded that general federal revenues could not be preserved by discriminating between citizens and aliens (App. A, *infra*, pp. 26–30). To the extent that the durational residence requirement represented a congressional judgment that aliens, visiting or residing temporarily in the United States, should not be given supplemental insurance coverage, the court found the five-year residence requirement an overly inclusive classification to accomplish this purpose (App. A, *infra*, pp. 30–32).

The court's judgment declared the entirety of the alien eligibility requirement of 42 U.S.C. 1395o(2)(B) unconstitutional, and permanently enjoined its enforcement (App. B, *infra*, p. 44).

THE QUESTIONS ARE SUBSTANTIAL

Plenary review by this Court is appropriate because the court below held unconstitutional significant provisions of an important Act of Congress, and because the constitutionality of congressional social benefit legislation which imposes durational residence requirements on aliens as a condition of eligibility was specifically left open in *Graham* v. *Richardson*, 403 U.S. 365, 382, n. 14. This is a common provision in other federal statutes. See, *e.g.*, 42 U.S.C. 426a(a)(4)(B), 42 U.S.C. 428(a)(3)(B), 42 U.S.C. Supp. II 1395i–2(a)(3)(B), 42 U.S.C. Supp. II 1382c(a)(B)(ii).

Moreover, the invalidation of the "lawfully admitted for permanent residence" requirement as a condition

to alien eligibility, and the district court's doubts as to its constitutionality, itself raises important questions of statutory interpretation and constitutional law. We submit that the statutory limitation of supplemental medical insurance benefits to citizens, and to those aliens who have been lawfully admitted for permanent residence in the United States and have continuously resided in the United States for five years prior to enrollment, are severable requirements and constitutional under the Due Process Clause.

A. A FIVE-YEAR DURATIONAL RESIDENCE REQUIREMENT FOR ALIEN ELIGIBILITY UNDER A FEDERAL WELFARE STATUTE IS CONSTITUTIONAL

1. The district court's holding that the Due Process Clause is violated by a congressional enactment which imposes a five-year durational residence requirement for alien eligibility in the Medicare supplemental insurance program, presents important questions as to the scope of Congress' power to enact a uniform rule of naturalization, and the constitutional standard for judging legislation enacted pursuant to that power.

The court below erroneously extended to an act of Congress precedents relating to disabilities imposed on short term residents or aliens by the states.

The failure of the precedents relied on by the court below to resolve the issue in this case is made plain by a brief exposition of the issues they involved. *Shapiro* v. *Thompson*, 394 U.S. 618, held that a state statute that denies welfare benefits to all persons who have resided in the state for less than one year is a denial of equal protection. But states, unlike

the federal government, have no power to regulate immigration. The issue presented by a state denial of welfare benefits to aliens only was decided in *Graham* v. *Richardson*, 403 U.S. 365. There this Court held that an Arizona requirement that only aliens must reside for fifteen years in the state before becoming eligible for welfare benefits was a denial of equal protection. Following *Graham*, *In re Griffiths*, No. 71–1336, decided June 25, 1973, held that a state could not deny an alien the opportunity to become a member of its bar, and *Sugarman* v. *Dougall*, No. 71–1222, decided June 25, 1973, held that a state could not deny aliens the opportunity of government employment.

But *Graham* and its progeny involved aliens suffering from no federal disability. The aliens involved *in Griffiths* and *Sugarman* were eligible, under federal law, to seek membership in the bar or obtain employment. A different case would be presented by an alien on a visitor's visa and thus under federal law ineligible to work, see 8 C.F.R. 214.1(e), 8 U.S.C. 1101(15)(B), even though the alien might in fact be a resident of the state.

The district court below drew from *Graham* the principle that alienage, even in a federal statute, is, in a fashion never quite made clear, a suspicious classification, and from *Shapiro* v. *Thompson*, *supra*, the principle that durational residency requirements for welfare benefits cannot be justified by the needs of welfare programs. This latter point we concede. But this logic overlooks the fact that in this statute Congress is not only making provision for the general

welfare, but is also exercising its power to enact uniform rules of naturalization. Constitution Art. I, Sec. 8, cl. 4. In the exercise of this power it is for Congress, not the courts, to delineate the various gradations from inadmissible alien through short-term visitor, to resident alien to citizen.

By enacting a statute which provides that the benefits of this particular welfare program are not available to aliens other than those lawfully admitted for permanent residence who have resided in the United States for at least five years, Congress has defined an aspect of the rights accruing to the aliens who qualify. Merely because in a line-drawing problem such as this it is impossible to justify any particular term of years does not mean that any particular term is unconstitutional, just as a particular numerical immigration quota is not invalid because it is no more or less supportable than some other number. See, *e.g.*, 8 U.S.C. 1151. Only if Congress has acted on the basis of some impermissible criteria, such as race or religion, would the statute be unconstitutional.

The plaintiffs have made no showing, and the court below has not found, that durational residence requirements are not a reasonable way to draw a line between those aliens with substantial ties to the United States and thus entitled to participate in some portion of the benefits of citizenship and those aliens with less substantial ties. The criterion is invalid only if durational residence has no reasonable relationship to the degree to which an alien can be thought to have acquired ties to the United States comparable to citizenship. But durational residence is in fact a simple and objective measure of such ties.

The court below announced, apparently as a rule of constitutional law, that "to the extent this nation continues to hold out a promise of refuge to victims of political and natural misfortune, the Constitution requires that we accept them to reside here on an equal basis with citizens" (App. A, *infra*, p. 40). The constitutional law and practice have, of course, been precisely the reverse, as the circumscribed status of the plaintiff parolees illustrates.

B. THE REQUIREMENT THAT AN ALIEN BE LAWFULLY ADMITTED FOR PERMANENT RESIDENCE IS SEVERABLE FROM THE DURATIONAL RESIDENCY REQUIREMENT AND IS ITSELF CONSTITUTIONAL

1. The district court also invalidated the lawfully-admitted-for-permanent-residence limitation on alien eligibility for supplemental medical insurance benefits, on the ground that it was not severable from the durational residence test.

We submit that the court's ruling on this aspect of the case is erroneous. This Court has recognized that, as a general matter, statutory limitations based upon residence and on a specified duration of residence, reflect independent and distinct statutory criteria. *Shapiro* v. *Thompson*, 394 U.S. 618, 636; *Dunn* v. *Blumstein*, 405 U.S. 330, 342–344. This is also true of the limitations at issue here. The lawfully-admitted-for-permanent-residence restriction serves to exclude from eligibility illegal entrants and long-term alien

residents of the United States such as diplomats and foreign correspondents who lack a firm tie with the United States but would not otherwise be excluded by a simple durational residence test. Moreover, the district court's discussion of the separability issue apparently assumes that unless it can be shown that Congress intended to treat the two requirements independently, the alien eligibility requirements must be considered not separable (App. A, *infra*, pp. 33–38). This, we submit, is an erroneous test. As this Court recently pointed out, *Tilton* v. *Richardson*, 403 U.S. 672, 684:

> "The cardinal principle of statutory construction is to save and not to destroy." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). In *Champlin Rfg. Co.* v. *Commission*, 286 U.S. 210, 234 (1932), the Court noted "The unconstitutionality of a part of an act does not necessarily defeat * * * the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."

See also, *United States* v. *Jackson*, 390 U.S. 570, 585.

The legislative history which the district court has summarized does not make it evident that the "lawfully admitted for permanent residence" requirement would not have been enacted independently of the durational residence test. The two provisions were in fact treated distinctly in conference, see H. Rep. No. 682, 89th Cong., 1st Sess., pp. 1, 8, 39–40, and

the "lawfully admitted for permanent residence" requirement serves the separate and distinct purpose of excluding from eligibility long term residents who have not manifested an intent to establish firm ties with the Unted States.

2. Finally, the doubts expressed by the district court as to the constitutionality of the "lawfully admitted for permanent residence" requirement are unwarranted. If it is lawful for Congress to deny to this class of aliens the right of permanent residence, then *a fortiori* it is lawful for Congress to deny them the benefits of this particular welfare program, one small part of the complex of national life-cycle programs designed to provide benefits to American citizens and others having a comparable relationship to the Nation.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

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JANUARY 1974.

APPENDIX A

United States District Court
Southern District of Florida

No. 72-1312-Civ-JLK

SANTIAGO DIAZ, JOSE A. CLARA, AND VICTOR CARLOS ESPINOSA, PLAINTIFFS

v.

CASPAR W. WEINBERGER, AS SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE OF THE UNITED STATES, DEFENDANT

MEMORANDUM OPINION

Before DYER, Circuit Judge, EATON and KING, District Judges

JAMES LAWRENCE KING, District Judge: This action challenges the constitutionality of the eligibility requirement for aliens who wish to enroll in the supplemental medical insurance plan established as part of the Medicare program. Section 1836(2)(A)(ii) of the Social Security Act of 1935, *as amended*, 42 U.S.C. § 1395o(2)(A)(ii) (1970), disqualifies all aliens from benefits but those lawfully admitted for permanent residence who have resided in the United States continuously for five years prior to making application for enrollment.[1]

[1] Section 1836 provides:
"Every individual who—
"(1) has attained the age of 65, and
"(2) (A) is a resident of the United States, and is either (i)

The supplemental medical insurance program, 42 U.S.C. § 1395j *et seq.* (1970), pays a substantial part of the cost of physicians' services, home health care, diagnostic tests, and medical appliances. 42 U.S.C. §§ 1395k, 1395x(m) and (s) (1970). Unlike Medicare's companion hospital insurance plan, 42 U.S.C. § 1395c *et seq.* (1970), one-half of the cost of the supplemental insurance program is financed by monthly premiums paid by individuals aged 65 or older who choose to enroll. 42 U.S.C. § 1395r(b) (1970).

Plaintiffs, who are Cuban refugees, seek injunctive and declaratory relief against operation of the alien eligibility provision on behalf of themselves, a class and sub-class of aliens similarly situated, pursuant to Fed. R. Civ. P. 23(a), (b)(2) and (c)(4). They charge that because the eligibility provision applies to aliens, but not to citizens, it discriminates invidiously against them in violation of the due process clause of the fifth amendment. A three-judge court was convened to consider their claim in accordance with 28 U.S.C. §§ 2282, 2284 (1970). The parties have stipulated, and we find, that no factual issues remain in dispute and that this action is ripe for decision on their opposing motions for summary judgment.

JURISDICTION

The court possesses jurisdiction pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g)

a citizen or (ii) an alien lawfully admitted for permanent residence who has resided in the United States continuously during the 5 years immediately preceding the month in which he applies for enrollment under this part, or (B) is entitled to hospital insurance benefits under part A, is eligible to enroll in the insurance program established by this part."

42 U.S.C. § 1395o (1970).

(1970),[2] and we therefore need not consider the other jurisdictional allegations of the complaint.[3] Although § 205(g) by its terms mandates a "final decision" by the Secretary prior to judicial review, to require plaintiffs to exhaust their administratve appeals would be to demand a futile act.

The purpose of § 205(g) is to "delay judicial review until (1) findings of fact are made by the Secretary or (2) the Secretary has had an opportunity to correct a lower level administrative error." *Morris* v. *Richardson*, 346 F. Supp. 494, 495 (N.D.Ga. 1972) (three-judge court), *appeal dismissed sub nom. Morris*

[2] Judicial review of supplemental medical insurance entitlement determinations is governed by Section 1869 of the Social Security Act of 1935, *as amended*, which provides in pertinent part:

"Any individual dissatisfied with any determination . . . as to entitlement under . . . part B [the supplemental medical insurance plan] . . . shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 205(b) of this title, and, in the case of a determination as to entitlement . . . to judicial review of the Secretary's final decision after such hearing as is provided in section 205(g) of this title."

42 U.S.C. § 1395ff(b) (1970). Section 205(g) of the Act in turn provides in pertinent part:

"Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision. . . . The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing."

42 U.S.C. § 405(g) (1970).

[3] Plaintiffs also alleged jurisdiction under 28 U.S.C. §§ 1331, 1361 and 5 U.S.C. § 702 (1970).

v. *Weinberger*, U.S. (1973). Neither problem is presented here. No factual issues remain in dispute, and 42 U.S.C. § 1395o(2)(A)(ii) (1970) places the Secretary under a ministerial duty to deny plaintiffs' applications for enrollment for supplemental benefits. Under these circumstances, we think it unnecessary for the named plaintiffs, who have applied for benefits, to pursue formalistic administrative appeals of initial adverse determinations.

Likewise, the general exhaustion doctrine is inapplicable to this case because plaintiffs challenge the statute's constitutionality. It is settled that "[w]here a plaintiff attacks the constitutionality of the statute under which an administrative agency acts, and the attack does not turn upon a factual determination requiring administrative expertise, the doctrine of exhaustion of administrative remedies does not apply." *Gainville* v. *Richardson*, 319 F. Supp. 16, 18 (D. Mass. 1970) (three-judge court), *citing Public Util. Comm'n* v. *United States*, 355 U.S. 534, 539 (1958); *Oestereich* v. *Selective Serv. Bd.*, 393 U.S. 233, 242 (1968); *cf. King* v. *Smith*, 392 U.S. 312 n.4 (1968).

CLASS ACTION DEMAND

Plaintiffs have moved for certification of this case as a class action with one sub-class pursuant to Fed. R. Civ. P. 23(a), (b)(2) and (c)(4).[4] The parties

[4] Plaintiffs' motion requested representation of a class consisting of:

"All persons in the United States who have been or will be denied enrollment under the Medicare Program, 42 U.S.C. § 1395 *et seq.* because of their failure to meet the citizenship or residency requirements of 42 U.S.C. § 1395o(2)(A)(i) and (ii)."

They also sought to represent a sub-class of:

"All non-citizens in the United States who have attained permanent resident status, who have been or will be denied

have stipulated that plaintiffs Diaz and Clara are Cuban refugee immigrants who have been admitted for residence in the United States,[5] but who have

enrollment under the Medicare Program because of their failure to meet the five-year continuous residency requirement of 42 U.S.C. § 1395o(2)(A)(ii)."

These proposed definitions are overbroad. Plaintiffs do not challenge their denial of enrollment in the entire "Medicare Program," which contains a similar alien eligibility provision for its hospital insurance plan, 42 U.S.C. § 426a(a)(4) (1970), but only the eligibility requirement for the supplemental medical insurance plan. In addition, the class plaintiffs Diaz and Clara propose to represent would include all aliens from ambassadors to vessel crew members. Such a definition finds no support in the stipulated facts, nor do we think it can comport with the requirement of Fed. R. Civ. P. 23(a)(3) that the claims or defenses of the representative parties be typical of those of the class. We will therefore make appropriate emendations to narrow the definitions of the class and sub-class certified.

[5] Plaintiffs Diaz and Clara, like many other Cuban refugees, were "paroled" into the United States by the Attorney General, and remain here at his discretion. 8 U.S.C. § 1182(d)(5) (1970). As parolees, they were allowed to reside in this country without regard to openings in the numerical limitations for immigrants. 8 U.S.C. §§ 1151, 1101(a)(27); Act of Oct. 3, 1965, Pub. L. No. 89-236, § 21(e), 79 Stat. 911. Although parole of an alien "shall not be regarded as an admission," 8 U.S.C. § 1182(d)(5) (1970), and does not ordinarily place him "legally within the United States," *Ma v. Barber*, 357 U.S. 185, 189-90 (1958), we think that the special legislation which authorizes the adjustment of status of Cuban parolees to that of lawful admission for permanent residence implicitly recognizes that their parole contemplates something more in the nature of an entry than a detention. Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161, *in* 8 U.S.C. § 1255 note (1970). *See* note 6 *infra*.

In addition to parole, there is one other significant way for immigrant aliens to avoid the numerical limitations and to gain admission to the United States. A limited number of "conditional entry" permits is available to aliens uprooted from their homeland by designated natural catastrophes and by persecu-

neither resided in the United States continuously for five years nor been lawfully admitted for permanent residence within the statutory meaning of that term.[6]

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tion either in Communist-dominated nations or in countries in the Middle East. 8 U.S.C. § 1153(a)(7) (1970).

[6] The Secretary defers to factual determinations by the Attorney General that an alien seeking enrollment in Medicare comes within the statutory meaning of this phrase, pursuant to Social Security Ruling 68–38 which states, in pertinent part:

"The phrase 'lawfully admitted for permanent residence', as found in section 103(a)(4) of P.L. 89-97 and section 1836 (2)(a) of Title XVIII, is a term of art adopted from the Immigration and Nationality Act, in section 101(a)(29) of which it is defined [8 U.S.C. § 1101(a)(20) (1970)]. Accordingly, the phrase has the same meaning in Title XVIII as it does in the Immigration and Nationality Act. The Administration, in its determinations under sections 103 and 1836 is obliged to accept the determinations of the Attorney General and his delegates as to the fact of lawful admission, since only that official is authorized by statute to make such determinations."

Social Security Administration, 1968 Cum. Bull. 197, *in* 1 Unempl. Ins. Rep. ¶15,064 at 2499–289; *cf.* Social Security Administration, Claims Manual, pt. 10, §§ 10108.7–10108.9 (1973).

Under the Immigration and Nationality Act of 1952, *as amended*, 8 U.S.C. §§ 1101 *et seq.* (1970), every applicant for admission to the United States is presumed to be an immigrant seeking lawful admission for permanent residence until he demonstrates that he is entitled to admission as a nonimmigrant. 8 U.S.C. § 1184 (1970); *see* note 8 *infra*. An immigrant who meets the other requirements for admission must await an opening in the numerical limitations before he may be issued an immigrant visa and, upon arrival, acquire permanent residence status. 8 U.S.C. § 1151(a) (1970).

Aliens who arrive in the United States not as immigrants, but as parolees, conditional entrants or nonimmigrants may, in some cases, later obtain adjustment of their status to that of permanent residence. Thus, Cuban parolees like plaintiffs Diaz and Clara become eligible for an adjustment of status after being "physically present in the United States for at least two years." Act of Nov. 2, 1966, Pub. L. No. 89–732, 80 Stat. 1161, *in* 8 U.S.C. § 1255 note (1970). Upon making application, the Cuban parolee faces a further delay, which we are informed is now approximately two years, while he awaits an opening in the Western Hemisphere numerical limitation. *Id.; see* note 5 *supra*. After acquiring a place in the quota and a determination of admissibility from the Attorney General, he is entitled to permanent residence status retroactive, in most cases, to the date of his admission. *Id.* It is important to note, however, that in practice Cuban parolees cannot ordinarily obtain permanent residence status until they have resided in the United States for four years or more.

Likewise, conditional entrants may obtain permanent residence status retroactive to the date of their entry after residing in the United States for at least two years. 8 U.S.C. § 1153 (g) and (h) (1970). With the exception of alien crewmen and natives of countries of the Western Hemisphere, other aliens may obtain adjustments of their status at the discretion of the Attorney General no matter how they first lawfully gained admission into the United States, provided that there is an opening in the numerical limitations. 8 U.S.C. § 1255 (1970). Adjustments may also be made by the Attorney General to avoid hardships in the case of deportable aliens, 8 U.S.C. § 1254 (1970), and aliens who arrived in the United States prior to July 1, 1924. 8 U.S.C. § 1259 (1970).

[7] Plaintiff Espinoza's claim denial notice does not appear of record, but 42 U.S.C. § 1395o(2)(a)(ii) (1970) imposes upon the Secretary a ministerial duty to reject his application, and we proceed upon the assumption that the Secretary did not act improperly.

Plaintiff Espinosa has been lawfully admitted for permanent residence, but has not yet resided in the United States continuously for five years. All have applied for enrollment in the supplemental medical insurance program and been rejected.[7]

Plaintiffs submit, and we find, that each of the prerequisites for maintenance of a class action pursuant to Rules 23(a) and (b)(2) has been met with respect

to both the class and sub-class hereinafter defined. The class certified in this action shall consist of:

> All immigrants[*] residing in the United States who have attained the age of 65 and who have been or will be denied enrollment in the supplemental medical insurance program under Medicare, 42 U.S.C. § 1395j *et seq.* (1970), because they are not aliens lawfully admitted for permanent residence who have resided in the United States continuously during the five years immediately preceding the month in which they apply for enrollment as required by 42 U.S.C. § 1395o(2)(A)(ii) (1970).

Pursuant to Rule 23(c)(4), we will also certify a sub-class consisting of:

> All immigrants lawfully admitted for permanent residence in the United States who have attained the age of 65 and who have been or will be denied enrollment in the supplemental medical insurance program under Medicare, 42 U.S.C. § 1395j *et seq.* (1970), solely because of their failure to meet the five-year continuous residency requirement of 42 U.S.C. § 1395o(2)(A)(ii) (1970).

EQUAL PROTECTION STANDARD

Whether the compelling governmental interest test or the rational basis criterion provides the applicable

[*] The word "immigrant" is a term of art employed by the Immigration and Nationality Act of 1952, which is defined as "*every* alien except an alien who is within one of the . . . classes of nonimmigrant aliens." 8 U.S.C. § 1101(a)(15) (1970) (emphasis added). Twelve categories of nonimmigrant aliens are explicitly enumerated by the Act and include, for example, diplomatic personnel, short-term visitors for business or pleasure, crewmen, students, braceros and foreign correspondents. *Id.* We use the term in its technical sense, which encompasses conditional entrants, as well as to include those who, like Cuban parolees, may become immigrants through retroactive adjustments of status. *See* note 5 *supra*.

standard by which the constitutionality of the alien eligibility provision must be assessed presents the threshhold question for consideration. Defendant contends that because this case falls within the area of economic and social welfare legislation, it must ipso facto be governed by the rule that the "Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960); *Dandridge* v. *Williams*, 397 U.S. 471 (1970); *Richardson* v. *Belcher*, 404 U.S. 78 (1971); *Lindsey* v. *Normet*, 405 U.S. 56 (1972); *Jefferson* v. *Hackney*, 406 U.S. 535 (1972); *United States* v. *Kras*, U.S. (1973). But the government's reliance on *Nestor* and its progeny is inapposite to the extent that none of those cases involved even a colorable claim of discrimination.

Plaintiffs respond that the deprivation they suffer from denial of eligibility for supplemental medical insurance can only be justified if "necessary to promote a compelling governmental interest," *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969), because the classification they challenge, as one based on alienage, is "inherently suspect," *Graham* v. *Richardson*, 408 U.S. 365, 376 (1971); *Takahashi* v. *Fish & Game Comm'n*, 334 U.S. 410 (1948); *Korematsu* v. *United States*, 323 U.S. 214 (1944); cf. *Weber* v. *Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Hunter* v. *Erickson*, 393 U.S. 385 (1969); *Loving* v. *Virginia*, 388 U.S. 1 (1967), and burdens their access to one of the "necessities of life" in which they assert a "fundamental right." *Roe* v. *Wade*, U.S. (1973); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Bullock* v. *Carter*, 405 U.S. 134 (1972); *Shapiro* v. *Thompson*, *supra*; *Harper* v. *Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

But plaintiffs' invocation of cases requiring a compelling interest to justify classifications burdening or infringing certain fundamental constitutional rights is not entirely persuasive. Although we cannot denigrate the importance of medical care to the aged, or the possibility that its deprivation may amount to the denial of the constitutional right to life itself, it is far from clear that the denial of such "necessities of life" alone justifies application of the compelling interest standard, *Compare Graham* v. *Richardson, supra* at 380 *with Lindsey* v. *Normet, supra* at 73–74. Moreover, the very infancy of this, the first Congressional enactment ever to provide medical care benefits, cautions against presuming it to be a "fundamental right," the denial of which necessitates a high level of legislative justification. *Cf. Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). On the contrary, in the absence of an apparent or presumptive discriminatory purpose or effect, the courts have refrained from applying the compelling interest standard to social benefit legislation. *E. g. Lindsey* v. *Normet, supra; Jefferson* v. *Hackney, supra; Richardson* v. *Belcher, supra; Dandridge v. Williams, supra.*

Likewise, plaintiffs' reliance on decisions imposing a compelling interest standard on classifications deemed "inherently suspect" proves too much. Such a per se rule is doubtless appropriate where classifications are "based on unalterable traits such as race and lineage." *Lindsey* v. *Normet, supra* at 73 (footnotes omitted). But the fact that alienage is a governmentally created status suggests that it may not constitute such a consistently illegitimate distinction as to warrant mechanical application of the compelling interest test.[9] Indeed, the leading case treating alienage

[9] *See* Note, *Protection of Alien Rights Under the Fourteenth Amendment*, 1971 Duke L.J. 583, 594–97 (1971).

as an "inherently suspect" distinction avoided the express use of that test, *Graham* v. *Richardson, supra* at 375–76, although some more recent alienage decisions have held Congress to the compelling interest standards. *E.g. Jalil* v. *Hampton*, 460 F.2d 923 (D.C. Cir. 1972); *Faruki* v. *Rogers*, 349 F. Supp. 723 (D.D.C. 1972).

Although we cannot say that Congress may never be held to a lesser constitutional standard than the states, *but see Morris* v. *Richardson, supra* at 499, neither can we accept the view that Congress may never be held to the same standard. For example, to differentiate between citizens and aliens in regulating entry into the United States may be a presumptively proper exercise of Congressional power, whereas a like discrimination by legislatures regulating entry into the states would not: different fourteenth and fifth amendment constitutional tests might therefore be appropriate. *Cf. Graham* v. *Richardson, supra; Shapiro* v. *Thompson, supra.*

Inversely, there are occasions when the compelling interest test might just as appropriately be applied to Congresional enactments as to those of state legislatures. For example, the fact must not be overlooked that aliens are not simply politically disadvantaged, as are members of other "inherently suspect" classifications: they lack the power of the ballot entirely at both the state and federal levels. Moreover, aliens have endured a long history of open discrimination at the hands of the political process. *See, e.g. Oyama* v. *California*, 332 U.S. 633, 651 n.1 (1948) (Murphy, J. concurring). Because the political system provides no check on such discrimination, there may well be instances when application of a compelling interest standard is warranted in review of state and federal

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enactments to protect aliens from discrimination resulting from their lack of political representation.

If it is a close question whether the compelling interest standard should be applied to a classification based on alienage under the circumstances here, we think similar considerations permit the conclusion that, whatever the standard, the protection of fifth amendment due process is available to remedy such claims of discrimination against aliens as appear in this case. It is settled, at least, that aliens lawfully residing in the United States are "persons" within the meaning of both the fourteenth and fifth amendments, and are entitled to their protection. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 586 n.9 (1952); *Traux* v. *Raich*, 239 U.S. 33 (1915).

Moreover, even though fourteenth amendment notions of equal protection are not entirely congruent with fifth amendment concepts of due process, it is nonetheless accepted that "discrimination may be so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). The danger of unjustifiable discrimination against aliens is nowhere greater than in the enactment of social benefit programs like Medicare, where their complete lack of representation in the political process may result in the purposeful or inadvertent exclusion of aliens from benefits. It is in this sense that "[a]liens as a class are a prime example of a discrete and insular minority." *Graham* v. *Richardson*, *supra* at 372. We therefore conclude that the fifth amendment can here be said to contain the same "pledge of the protection of equal laws," *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886), as is evident from the fourteenth amendment. *Cf. Richardson* v. *Belcher*, *supra* at 81.

A statutory classification accords with fundamental equal protection and due process notions only if, as

recent decisions employing the rational basis test have acknowledged, it is both "rationally based *and free from invidious discrimination.*" *Dandridge* v. *Williams*, *supra* at 487, *quoted in Richardson* v. *Belcher*, *supra* at 81 (emphasis added); *cf. Jefferson* v. *Hackney*, *supra* at 547. Invidious discrimination may appear in either an impermissible statutory purpose, *see Gomillion* v. *Lightfoot*, 364 U.S. 339, 341 (1960); *Yick Wo* v. *Hopkins*, *supra*, or in the choice of a classification that is impermissibly discriminatory as applied to achieve a valid legislative purpose. *Cf. Hirabayashi* v. *United States*, 320 U.S. 81 (1949); *Korematsu* v. *United States*, *supra*. Because alienage is a classification "inherently suspect and . . . therefore subject to strict judicial scrutiny," *Graham* v. *Richardson*, *supra* at 376, we think the rational basis standard requires no less than such a twofold analysis of the provisions challenged here.[10] Whether the compelling interest standard should be applied instead need not be decided in view of our holding, for the reasons which follow, that the alien eligibility provision cannot meet even the requirements of the rational basis test.

ARGUMENT

Plaintiff contends that the entirety of the alien eligibility provision for supplemental medical benefits violates due process. For the sake of convenience, we turn our attention first to the five-year continuous residency aspect of 42 U.S.C. § 13959(2)(A)(ii) (1970). Defendant has advanced two legislative purposes which he asserts are valid of themselves and bear a rational relationship to this durational residency condition: (1) that the residency requirement

[10] *See Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1077–87 (1969).

is essential to the continuing fiscal integrity of the supplemental benefits program; and (2) that it is necessary to prevent certain aliens, such as short-term visitors, from obtaining benefits.

A. FISCAL INTEGRITY

We do not doubt that a desire to insure the continued fiscal integrity of the supplemental benefits program is itself a valid governmental purpose. *Cf. Shapiro* v. *Thompson, supra* at 633. But the facts do not support defendant's conclusion that the residency requirement either was intended to serve, or does serve, that objective.

If, in fact, Congress intended to protect the fiscal integrity of the program by attaching a residency requirement for alien eligibility, the legislative history of the provision is singularly casual about such a concern. The House-passed bill contained no durational residency requirement at all for alien participation in the supplemental benefits program. H. Rep. No. 682, 89th Cong., 1st Sess. 39 (1965), *in* 111 Cong Rec. 18371 (1965); U.S. Code Cong. & Ad. News 2233–34 (1965). Although the Senate version added a 10-year residency provision, 111 Cong. Rec. 15609, 15613 (1965), a conference committee compromise reduced it to the present five-year term. H. Rep. No. 682, *supra,* at 39–40. It is therefore difficult to conclude that Congress considered the durational residency requirement for aliens an element particularly important to the fiscal integrity of the supplemental medical insurance program.

The government nonetheless argues that the alien residency requirement is necessary to permit the supplemental benefits program to become increasingly self-supporting. Whereas this purpose may be apparent in the hospital insurance program created by

Medicare, 42 U.S.C. § 426a (1970); S. Rep. No. 404, 89th Cong., 1st Sess. 66–70 (1965), *in* U.S. Code Cong. & Ad. News 2007–11 (1965), it is not true of Medicare's supplemental medical insurance program.

The Federal Supplementary Medical Insurance Trust Fund created by the 1965 Medicare Amendments derives one-half of its income at all times from appropriations of the general revenues of the United States. 42 U.S.C. § 1395w (1970). The remaining half is supplied by monthly premium payments from eligible individuals who choose to enroll in the program. 42 U.S.C. § 1395r(b)(2) (1970). Moreover, unlike the hospital insurance system, the supplemental benefits program was intended by Congress to run on a "current cost" financing basis, and to be equally funded by general revenue contributions and adjustable premiums. S. Rep. No. 404, *supra.* Thus, the only discernible means by which the trust fund might become increasingly self-supporting is through adequate appreciation of its investments to permit decreases not only in premium payments but also in general revenue contributions. We can therefore find no evidence that the alien residency requirement is either necessary or rationally related to the asserted purpose of maintaining, much less improving, the fiscal position of the supplemental medical insurance program.

Nor can defendant argue that Congress may validly exclude retirement-age aliens from participation in the supplemental benefits program simply because their inclusion would require additional federal revenue contributions to the trust fund. Regardless of whether they have ever in their lives paid federal taxes, retired indigent citizens who receive state public assistance benefits are eligible for the supplemental medical insurance program *see* 42 U.S.C. § 1395s (f) and (i) (1970), and the general revenues provide half

the cost of their benefits. Moreover, federal tax revenues are still further depleted on behalf of retired indigent citizens to the extent that the supplemental program's monthly premiums due from them may be paid by state public assistance programs, 42 U.S.C. § 1305v(d)(1) (1970), which are funded in substantial part by the federal government. 42 U.S.C. § 1396b (a)(1) (1970). But the five-year residency requirement operates to exclude retirement-age aliens, whether indigent or not, from these same benefits, despite the fact that those among them who are indigent may not be barred from state public assistance programs on the basis of durational state residency requirements. *Muchado* v. *Department of Health & Rehab. Serv.*, — F. Supp. — (S.D.Fla. 1973 (three-judge court); *Zarate* v. *Department of Health & Rehab. Serv.*, 347 F.Supp. 1004 (S.D.Fla. 1971) (three-judge court); *cf. Graham* v. *Richardson, supra;* 42 U.S.C. § 1396a(a)(10)(II) (1970).

If it was the Congressional purpose to preserve the general federal revenues from depletion by excluding aliens alone through the residency requirement, that classification results in a discrimination which can only be termed invidious. The general revenues used to pay supplemental benefits to retired indigent citizens come from taxes imposed on all nonindigents in the United States, and it must not be forgotten that "[a]liens, like citizens pay taxes." *Graham* v. *Richardson, supra* at 376. Federal taxes paid by aliens therefore underwrite the very supplemental benefits for retired indigent citizens which Congress has made unavailable to members of plaintiffs' class. To the extent that aliens, but not citizens, are deprived of supplemental benefits by the durational residency requirement, the classification discriminates invidiously

against them.[11] If Congress may choose to underwrite a major part of the medical expenses of retired indigent citizens with funds from the public treasury, it may not constitutionally do so on the basis of a classification which works an exclusion from benefits of similarly situated aliens. *Shapiro* v. *Thompson, supra* at 633 & n.11.

In addition, we must question the basic rationality of attempting to achieve cost economies in the supplemental medical benefits program by means of a residency requirement having the necessary effect that this one now has on members of plaintiffs' class. Because it simply serves to postpone their eligibility for supplemental medical benefits, we think it not improbable that those who desire and need such benefits will defer, insofar as humanly possible, all covered medical expenses until such time as they meet the eligiblity requirements. The net result can only be higher benefits claims for each such individual when he becomes eligible, given a five-year period of minimal

[11] As of November 1972, Cuban Refugee Center statistics showed that 446,387 Cuban refugees had arrived in the United States since January 1961. Cuban Refugee Program, Weekly Statistical Report, pt. A (Nov. 17, 1972). Plaintiffs' Memorandum for Summary Judgment, Exhibit A. Of these, 159,643 arrived between February 2, 1968, and October 30, 1972, during which period 12,730 or 8 percent were age 65 or over upon arrival. *Compare* Cuban Refugee Program, Consolidated Report of Overall Operation (Oct. 1972). Plaintiffs' Memorandum for Summary Judgment, Exhibit C2, *with* Cuban Refugee Program, Consolidated Report of Overall Operation (Jan. 1968). Plaintiffs' Memorandum for Summary Judgment, Exhibit B2. Although this sample is inadequate as a basis for more detailed projections, it does not appear that the number of Cuban refugees whose age would otherwise qualify them for supplemental medical insurance benefits is disproportionately large in comparison with the number of potential new taxpayers.

medical care with its attendant frustration of the economies of preventive medicine. Thus, the residency requirement appears more likely to increase, rather than decrease, the costs of the supplemental medical insurance program, unless the rather morbid presumption is indulged that mortality among members of the class prior to the time that they become eligible will more than offset such increases.

B. UNDESERVING ALIENS

The government suggests, secondly, that Congress may validly seek to exclude entirely certain aliens from receiving supplemental medical insurance benefits. Specifically, defendant asserts that Congress may rationally bar from the program aliens visiting or residing in the United States temporarily, aliens who enter solely to obtain medical treatment, and aliens who are residing illegally in the United States. We assume, without deciding, that such a purpose is a proper one. *But see Shapiro* v. *Thompson, supra* at 631.

We think the alien residency requirement constitutes an overly inclusive classification to accomplish any of these purposes. Although a five-year period may be long enough effectively to exclude most short-term alien visitors or residents, it will not exclude those maintaining their domicile abroad but who, like ambassadors, foreign correspondents and other professionals, may be required by their occupation to reside in the United States for longer periods of time. Even aliens entering the country for medical treatment will not necessarily be excluded by the alien residency requirement if the treatment they seek demands such prolonged care and observation as may be necessary for cancer and other major diseases. Likewise, if the five-year residency test contributes at all

to the apprehension and exclusion from benefits of aliens residing here illegally, a shorter residency period should perform the same functions even better. The durational residency provision "enact[s] what in effect are non-rebuttable presumptions that every [alien] applicant for assistance" came to the United States for a disqualifying purpose. *Shaprio* v. *Thompson, supra* at 631. To utilize the alien residency requirement to serve these purposes is therefore to use a particularly blunt instrument for a surgical task.

In evaluating the impact of this imlement on plaintiffs' class, we cannot ignore the fact that its design was, as we have noted, the product of compromise. Perhaps the only consistent result of that compromise is to exclude immigrant aliens from supplemental medical benefits until such time as they are eligible for citizenship and, as citizens, for benefits.[12] The fact that the compromise residency requirement corresponds to the waiting term for naturalization cuts against, not in favor of its constitutionality as a tool for barring a limited number of aliens from benefits. If some aliens may legitimately be excluded from the supplemental medical benefits program, as we have assumed, the use of a classification so overbroad that it excludes almost all aliens *qua* aliens is invidiously discriminatory, if it is not arbitrary and without ra-

[12] Five years of continuous residence are also required for eligibility for naturalization. 8 U.S.C. § 1427(a)(1) (1970); *see* note 21 *infra*. Naturalized citizens are, of course, eligible for supplemental medical insurance benefits upon the sole condition that they attain the age of 65. 42 U.S.C. § 1395o(1) and (2)(A)(i) (1970). Although naturalization requires permanent residence status in conjunction with five years of residence, adjustments of status retroactive to the date of arrival can be obtained by plaintiffs and members of the class they represent, a process which takes less than five years in the case of Cuban parolees. *See* note 6 *supra*.

tional basis. *Cf. Hirabayashi vs. United States, supra; Korematsu v. United States, supra.*

C. OTHER JUSTIFICATIONS

Shapiro v. *Thompson* suggests other possible legislative purposes which might justify the alien residency requirement, although defendant has not urged them upon us. They merit consideration because the courts, in applying the rational basis standards, have attributed to the legislature any reasonably conceivable purpose which would support the constitutionality of the classification.[13] It could be argued here, as it was in *Shapiro,* that the residency requirement "(1) facilitates the planning of the welfare budget; (2) provides an objective test of residency; (3) minimizes the opportunity for recipients fraudulently to receive payments from more than one jurisdiction; and (4) encourages the early entry of new residents into the labor force." 394 U.S. at 643.

The fact that no residency requirement for eligibility is placed on citizens belies any attempt to justify it as essential for planning either general revenue or trust fund budgets, especially since long-term projections are unnecessary given the program's funding on a "current cost" basis. Nor can the five-year delay in eligibility be rationalized as an objective test of residency in light of the provision's twin requirement of permanent residence status which, however it may constitutionally be defined, provides just such a test. Lastly, it suffices to note that the possibility of fraudulent receipt of benefits from more than one jurisdiction is here inoperative, as is any legislative purpose to encourage the entry of retirement-age

[13] *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1078 (1969).

aliens into the labor force. For these reasons we must conclude that the classification created by application of the residency requirement to aliens, but not to citizens, is invidiously discriminatory as a means to accomplish these arguably valid legislative purposes.

Defendant has advanced no other theory to justify the durational residency requirement, and we can conceive of none. We therefore decide that the five-year residency requirement for alien eligibility for supplemental medical insurance benefits violates equal protection notions inherent in fifth amendment due process. To grant relief to plaintiff Espinoza and the subclass of those with permanent residence status which he represents, we need continue no further.

SEPARABILITY

Yet plaintiffs Diaz and Clara urge on behalf of the class herein certified that we proceed to examine the constitutionality of the requirement of permanent residence status. We have no occasion to consider this second aspect of the alien eligibility provision, however, because its permanent residence language cannot, in our view, be severed from the durational residency requirement.[14]

The very wording of the twin residency requirements suggests that Congress may not have intended

[14] Although for this reason we need not consider *Asensio v. Richardson*, Civil No. 71-1446, [1972 Transfer Binder] CCH Medicare & Medicaid Guide ¶26,475, at 10,242-44 (S.D. Fla. May 2, 1972), we note that our decision here is not inconsistent with that case because the ruling there concerned a deported nonimmigrant who had no reasonable expectation of remaining in the United States for other than a "temporary period of time." *Id* at 10,244; *see* note 5 *supra.*

similar requirements in subsequent laws are not uninstructive,[15] no prior social benefit legislation contains such a provision.[16] And even though administrative

residence language first appeared after amendment of H.R. 6675 by the Senate Finance Committee in closed session. S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1 at 194 (1965), in U.S. Code Cong. & Ad. News 2134 (1965). Despite a paraphrase in disjunctive form in the Senate report, S. Rep. No. 404, pt. 1, *supra* at 25, *in* U.S. Code Cong. & Ad. News, *supra* at 1961, the explanatory material more often follows the exact language of the amended provision. S. Rep. No. 404, pt. 1, *supra* at 69, 194, *in* U.S. Code Cong. & Ad. News, *supra* at 2007, 2134 (1965).

[15] *See* 42 U.S.C. § 1382c(a)(1)(B)(ii) (Supp. II, 1973); 42 U.S.C. § 428(a)(3)(B) (1970). We think it significant that the most recent expression of the will of Congress on eligibility for social benefits makes special provision for parolees and conditional entrants to insure their inclusion as individuals eligible for aid to the aged, blind and disabled. This eligibility test abandons the durational residency requirement for aliens, and its permanent residence provision contains a new exception. Benefits are made available to an otherwise qualified individual who is: "either (i) a citizen or (ii) an alien lawfully admitted for permanent residence or otherwise *permanently residing in the United States under color of law* (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) [conditional entry] or section 212(d)(5) [parole] of the Immigration and Nationality Act)."

42 U.S.C. §1382c(a)(1)(B) (Supp. II, 1973) (emphasis added).

[16] A key word computer search of all but Title 8 of the 1970 edition of the *United States Code* which focused on the terms "alien" and "eligible" and varients thereon failed to reveal the existence of any pre-1965 legislative provision then in force that links permanent residence and durational residency elements. *But cf.* 8 U.S.C. § 1427(a) (1970). The court acknowledges with appreciation the help in resolving this question provided by the Office of Computer Services in the Administrative Division of the Department of Justice, and of JURIS, the Justice Retrieval and Inquiry System.

that they be separable.[17] Moreover, the legislative history of the alien eligibility provision for supplemental medical insurance is devoid of evidence of Congressional intent to treat its twin requirements as severable ones.[18] Nor is guidance provided by the history of any other provision of the 1965 Amendments.[17] If

[15] If the phrases were linked by a conjunction such as "and" or "or," rather than by the relative pronoun "who," we would be less hesitant than we are to conclude that Congress intended them to be separable.

[16] Although Section 1836 of H.R. 6675 contained no durational residency requirement when initially considered and passed by the House on April 8, 1965, 111 Cong. Rec. 7444 (1965), such a provision was an integral part of the bill which received Senate approval. However, no clear manifestation of Congressional intent about separability is evident in the report of the Senate Finance Committee where, in closed session, the alien eligibility language of H.R. 6675 attained its present form. S. Rep. No. 404, 89th Cong., 1st Sess., pt. 2 at 483 (1965), *in* Senate Reports, Miscellaneous Reports on Public Bills III (GPO 1965). Although the alien eligibility provision is once paraphrased disjunctively in the explanatory section of the Senate report, S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1 at 70 (1965), *in* U.S. Code Cong. & Ad. News 2011 (1965), that document elsewhere consistently traces the exact language of the amended provision. S. Rep. No. 404, pt. 1, *supra* at 39, 170 *in* U.S. Code Cong. & Ad. News, *supra* at 1980, 2109. No instructive discussion of severability occurred on the Senate floor because the eligibility provision was submitted as one of several technical amendments at the start of debate. 111 Cong. Rec. 15613 (1965), and was accepted without separate consideration. 111 Cong. Rec. 15609 (1965).

[17] Although Section 103(a)(4) of H.R. 6675 contained in its final form, an identical alien eligibility provision for the Medicare hospital insurance plan, its legislative history is no more illuminating on the separability question. As it initially passed the House, that provision contained a 10-year residency requirement, but no permanent residence component. H. Rep. No. 682, 89th Cong., 1st Sess. 39 (1965), *in* 111 Cong. Rec. 18371 (1965); U.S. Code Cong. & Ad. News 2233 (1965). The permanent

practice may sometimes be persuasive evidence of legislative intent, *e.g. Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), it is of little assistance here.[20]

The most reliable indication of Congressional intent appears in the report of the House delegation to the conference committee, which reveals that unification of the two residency elements was an integral part of the larger compromise necessary to the final passage of the 1965 Medicare Amendments.[21] Although

[20] The Social Security Administration, charged with implementing the Medicare programs, has issued an interpretation of the alien eligibility requirement which leaves the separability issue in doubt:

"An individual who is age 65 or over is eligible for enrollment in the supplementary medical insurance plan . . . if:

* * * * *

"(c) He is an alien lawfully admitted for permanent residence, *who* is a resident of the United States *and who* has resided in the United States continuously during the 5 years immediately preceding the month in which he applies for enrollment."

20 C.F.R. § 405.206 (Supp. 1972). It may be that in practice some applications for enrollment are rejected solely for failure to meet one part of the residency requirement or the other, *see* note 6 *supra*, as were those of plaintiffs Diaz and Clara for inadequate length of residence. Their rejection notices, which followed what appears to be a standard format, stated:

"*You* are not entitled to health insurance protection under the Social Security Act because you are not a United States citizen and have not resided in the U.S. for a required period of time. A *person* not entitled to social security benefit or railroad retirement annuity must be a citizen or must have been admitted to the United States for permanent residence and have actually resided in the U.S. for 5 years immediately before the month he filed for health insurance." (Emphasis added.)

We think such evidence of administrative interpretation too inconclusive to be entitled to great deference.

[21] The legislative history of the alien eligibility provision as finally enacted demonstrates that it was a product of compromise. Neither House simply "receded" before the wishes of the other. The report submitted to the House on H.R. 6675 by that Chamber's conferees indicates that the differences between the two Houses over the alien eligibility provision in Section 1836 of the bill for the part B supplemental medical insurance plan were not considered in isolation, but jointly with like disagreements over the eligibility provision for the part A hospital insurance plan in Section 103(a)(4). H. Rep. No. 682, 89th Cong., 1st Sess. 39–40 (1965), *in* 111 Cong. Rec. 18371 (1965); U.S. Code Cong. & Ad. News 2233–34 (1965). The House bill initially contained only a requirement of permanent residence status for part B, and only a 10-year residency provision for part A. The Senate incorporated a 10-year residency provision into part B, and a requirement of permanent residence status into part A, while shortening the original 10-year residency provision of part A to six months. The conference committee compromise package integrated the permanent residence requirement with a five-year residency provision, and imposed the resulting unified eligibility requirement on both the part A hospital insurance and part B supplemental medical insurance plans.

It may well be, as the government suggests, that the terms of the compromise were adapted from the residence requirement for naturalization contained in Section 316(a) of the Immigration and Nationality Act of 1952, which provides in pertinent part:

"No person . . . shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totalling at least half of that time . . . ."

8 U.S.C. § 1427(a) (1970). Yet if this not unlikely hypothesis could be confirmed, the fact that the twin elements of the supplemental insurance plan's eligibility provision were both borrowed from the naturalization statute would, of itself, provide weighty evidence that Congress did not intend them to be separable. Perhaps more persuasive evidence for the same conclusion is provided by the difficulties that would be inherent in

we recognize that reasonable men might differ on this question, we think the closely interwoven compromise

language of the eligibility requirement's twin residency aspects rebuts any lingering presumption of separabilty from the general savings clause of the Social Security Act,[22] and that the entire provision must stand or fall as an entity.[23]

CONCLUSION

On the basis of the foregoing findings of fact and conclusions of law, we hold the entirety of the alien eligibility requirement of 42 U.S.C. § 1395o(2)(A)(ii)

rescuing the permanent residence language of § 316(a) if its five-year residency provision were stricken. But whatever the case, pragmatic compromise or adaptation, the evidence points to the conclusion that Congress intended no separability of the twin requirements of the alien eligibility provision.

[22] Section 1103 of the Social Security Act of 1935 provides:

"If any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby."

42 U.S.C. § 1303 (1970).

[23] The touchstone of separability is, of course, Congressional intent. For this reason, the Supreme Court recently observed:

"[W]hatever relevance such an explicit [severability] clause might have in creating a presumption of severability, the ultimate determination of severability will rarely turn on the presence or absence of such a clause."

United States v. Jackson, 390 U.S. 570, 585 n.27 (1968) (citations omitted). We have serious doubts, for the reasons stated, that Congress would have enacted the permanent residence language by itself, and we are not without reservations about the constitutionality of that aspect of the residency requirement. Particularly in view of the possibility that Congress adapted the alien eligibility provision from the prerequisites for naturalization, *see* note 21 *supra*, we think it evident that the twin requirements are not sufficiently independent that "the valid part may be dropped [because] what is left is fully operative as a law." *Id.* at 585, *quoting* Champlin Rfg. Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932).

(1970) unconstitutional as a denial of fifth amendment due process. We therefore permanently enjoin the defendant Secretary from this day forward from relying on that provision to deny enrollment in the Medicare supplemental insurance plan, 42 U.S.C. § 1395j *et seq.* (1970), not only to plaintiff Espinoza and the sub-class he represents, but also to plaintiffs Diaz and Clara and the class herein certified.

The fact that it was unnecessary to reach the issue posed by the permanent residence requirement does not mean that we entertain no doubts about its constitutionality. Although the phrase may appear on its face to be a legitimate extension of the Congressional power to regulate entry into the United States, in actuality it may simply duplicate the immigration laws which screen out potential immigrants likely to become public charges.[24] Moreover, if its efficacy as a

[24] For a brief summary of the provisions of the Immigration and Nationality Act which operate to exclude and remove immigrant aliens likely to become, or who do become, public charges, see Graham v. Richardson, 403 U.S. 365, 377 (1971). These provisions apply not only to immigrants, but also to non-immigrants, unless waived by the Attorney General. 8 U.S.C. §§ 1182(a), 1181(a) (1970); 8 C.F.R. § 214.1(a) (Supp. 1973). Although parolees and conditional entrants may arrive in the United States without first meeting these self-support admission standards, 8 U.S.C. §§ 1153(a)(7), 1182(d)(5) (1970); 8 C.F.R. § 212.5(a) (Supp. 1973), parole is subject to revocation at any time at the Attorney General's discretion. Parolees who seek adjustments of status to that of permanent residence either to obtain greater security or to become eligible for naturalization must meet the standard admission requirements, including those of financial self-support. Act of Nov. 2, 1966, Pub. L. No. 89-732, § 1, 80 Stat. 1161, *in* 8 U.S.C. § 1255 note (1970); 8 U.S.C. §§ 1182(a), 1255(a) (1970). It is mandatory that conditional entrants who have not acquired permanent residence status after residing in the United States for two years be examined to determine whether they meet the financial requirements for ad-

deterrent is subject to question, so too is the rationality of its scope as a means to achieve the legislative purposes the government has here advanced in defense of the entire alien eligibility provision.

Neither can we ignore the fact that to uphold the requirement of permanent residence status would be to work a fundamental injustice in that a major part of the relief contemplated by this decision would thereby be rendered a nullity. Plaintiffs Diaz and Clara and the not insubstantial class they represent would be barred from eligibility for supplemental medical benefits for all but about a year prior to becoming eligible for benefits as citizens.[25]

America once held her arms wide open, beckoning other lands to "[g]ive me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shores . . . ."[26] Although it may be, as some cynics have remarked, that that is exactly what she got, to the extent this nation continues to hold out a promise of refuge to victims of political and natural misfortune, the Constitution requires that we accept them to reside here on an equal basis with citizens.

Done and *Ordered* in chambers at the United States Courthouse in Miami, Florida, this 11th day of June, 1973.

JAMES LAWRENCE KING,
United States District Judge.

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mission or must be deported. 8 U.S.C. § 1153(g) (1970). Likewise, nonimmigrants who seek adjustments of status to that of permanent residence must meet the prerequisites for admission, including those of self-support. 8 U.S.C. § 1255(a) (1970).

[25] *See* notes 6 & 21 *supra*.

[26] E. Lazarus, "The New Colossus" (1883).

United States District Court
Southern District of Florida

Case No. 72-1312-Civ-JLK

SANTIAGO DIAZ ET AL., PLAINTIFFS

v.

CASPAR W. WEINBERGER, AS SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE OF THE UNITED STATES, DEFENDANT

ORDER CORRECTING CLERICAL ERRORS

This action came on before the court upon the court's own motion, sua sponte, pursuant to Fed.R. Civ.P. 60(a) for correction of clerical errors in the court's memorandum opinion dated June 11, 1973. It appearing that if an appeal has been taken, it has not yet been docketed in the United States Supreme Court, it is hereby

Ordered and *Adjudged* that the following clerical errors which arose from oversight or omission in the court's memorandum opinion dated June 11, 1973, be and the same are hereby corrected as indicated below. (Language in parentheses is the original, uncorrected language; that in brackets, the corrected version.)

TEXT

(1) Page 1, line 13: (§§ 1395k, 1395x(m) and (s)) to read [§§ 1395k, 1395x(m,s)];

(2) Page 2, line 20: (—— U.S. ——) to read [410 U.S. 422];

(3) Page 3, line 110: (have been admitted for residence to read [have been welcomed for residence];

(4) Page 4, line 14: (threshhold) to read [threshold];

(5) Page 4, line 24: (—— U.S. ——) to read [409 U.S. 434];

(6) Page 4, line 25: (reliance on *Nestor*) to read [reliance on *Flemming*];

(7) Page 4, line 33: (408 U.S. 365) to read [403 U.S. 365];

(8) Page 5, line 4: (—— U.S. ——) to read [410 U.S. 113];

(9) Page 6, line 31: (*See, e.g. Ogama*) to read [*See, e.g., Ogama*);

(10) Page 7, line 20: (347 U.S. 497 (1954)) to read [347 U.S. 497, 499 (1954)];

(11) Page 8, line 28: (§ 13959(2)(A)(ii)) to read [§ 1395*o*(2)(A)(ii)];

(12) Page 9, line 28: (89th Cong., 1st Sess. 66–70) to read [89th Cong., 1st Sess., pt. 1 at 66–70];

(13) Page 10, line 26: (§ 1395s(f) and (i)) to read [§ 1395s(f,i)];

(14) Page 10, line 31: (§ 1305v(d)) to read [§ 1395v(d)];

(15) Page 11, line 5: (*Machado*) to read [*Machado*];

(16) Page 11, line 6: (—— F.Supp ——) to read [357 F.Supp. 890];

(17) Page 14, line 18: (at 643) to read [at 634];

(18) Page 15, line 13: (Espinoza) to read [Espinosa];

(19) Page 16, line 25: (Espinoza) to read [Espinosa];

(20) Page 17, line 19: (that that) to read [that this];

FOOTNOTES

(1) Page 1, note 2, line 10: (entitlement . . . to) to read [entitlement, . . . to];

(2) Page 3, note 6, line 8: (1836(2)(a)) to read [1836(2)(A)];

(3) Page 3, note 6, line 10: ((29) of which it is defined [8 U.S.C. § 1101 (a)(20) (1970)]) to read [(20) of which it is defined (8 U.S.C. § 1101 (a)(20) (1970))];

(4) Page 4, note 6, line 26: (§ 1153 (g) and (h) (1970)) to read [§ 1153(g,h)];

(5) Page 5, note 7, line 1: (Espinoza) to read [Espinosa];

(6) Page 5, note 8, line 13: (adjustments of status.) to read [adjustments of status and whose parole contemplates something more in the nature of an entry than a detention.];

(7) Page 6, note 12, line 7: (in conjunction with) to read [in addition to];

(8) Page 6, note 12, line 8: (years of residence, adjustments of status retroactive) to read [years of residency, adjustments to permanent residence status retroactive].

Done and *Ordered* in chambers this 30 day of August, 1973, at the United States Courthouse, Miami, Florida.

JAMES LAWRENCE KING,
United States District Judge.

APPENDIX B

United States District Court
Southern District of Florida

No. 72-1312-Civ-JLK

SANTIAGO DIAZ, JOSE A. CLARA, AND VICTOR CARLOS ESPINOSA, PLAINTIFFS

v.

CASPAR W. WEINBERGER, AS SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE OF THE UNITED STATES, DEFENDANT

FINAL JUDGMENT

This action having come before the court on opposing motions for summary judgment, and the court having heard oral argument, considered the entirety of the record, and being fully advised in the premises, it is,

Ordered that plaintiffs' motion for summary judgment and their prayer for final declaratory and injunctive relief on behalf of themselves and the class and sub-class certified is hereby granted and defendant's motion for summary judgment is hereby denied in accordance with the court's memorandum opinion of June 11, 1973, and for the reasons set forth therein.

Done and *Ordered* in chambers at the United States District Courthouse, Miami, Dade County, Florida, this day of August, 1973.

DAVID W. DYER,
United States Circuit Judge,
JOE EATON,
United States District Judge,
JAMES LAWRENCE KING,
United States District Judge.

APPENDIX C

United States District Court
Southern District of Florida

No. 72-1312-Civ-JLK

SANTIAGO DIAZ, JOSE A. CLARA, AND VICTOR CARLOS ESPINOSA, PLAINTIFFS

v.

CASPAR W. WEINBERGER, AS SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE OF THE UNITED STATES, DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that Defendant, United States of America, appeals to the United States Supreme Court from the Final Judgment and from the Order dated August 7, 1973, entered by the Honorable David W. Dyer, United States Circuit Judge, the Honorable Joe Eaton, United States District Judge, and the Honorable James Lawrence King, United States District Judge.

ROBERT W. RUST,
United States Attorney.

[Filed September 6, 1973, Joseph L. Bogart, Clerk, U.S. Dist. Ct., Southern Dist. of Fla., Miami, Fla.]

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing Notice of Appeal was this 5th day of September, 1973, mailed to Alfred Feinberg, Esq., Legal Services of Greater Miami, Inc., 395 Northwest 1st Street, Suite 202, Miami, Florida.

MERVYN L. AMES.

U.S. GOVERNMENT PRINTING OFFICE 1974

Supreme Court, U. S.
FILED
JUN 27 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1973

No. 73-1046

CASPAR W. WEINBERGER,

Appellant

—v.—

SANTIAGO DIAZ, JOSE A. CLARA and
VICTOR CARLOS ESPINOSA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT FILED JANUARY 3, 1974
PROBABLE JURISDICTION NOTED MAY 13, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1046

CASPAR W. WEINBERGER,

Appellant

—v.—

SANTIAGO DIAZ, JOSE A. CLARA and
VICTOR CARLOS ESPINOSA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 72-1312—Civ.—JLK

RELEVANT DOCKET ENTRIES

Date	PROCEEDINGS
1972	
Aug. 18	Complaint. 3 JUDGE COURT REQUESTED
31	Ltr. & ORDER: Designation of three judge court: C. B. Fulton; J. Eaton and D. D. Dyer. (8/29/72-John R. Brown, Chief Judge 5th Circuit)
Sept. 7	ORDER: Order dated Aug. 29, 1972 Supersedes in part to D. W. DYER; J. EATON & JAMES LAWRENCE KING. (9/5/72 J.R. Brown, Chief Judge 5th Circuit).
25	Motion To Add Parties Pltf. and to File an Amended Complaint and Memo of Law in Support, by Pltfs.
Sept. 28	First Amended Complaint. (Pltfs.)
Sept. 28	ORDERED: Motion to add Parties Pltf. CLARA & ESPINOSA is GRANTED. ORDERED: Motion to File a First Amended Complaint is GRANTED & deemed filed as of the date hereof. Clerk to re-style the cause. (9-28-72-JLK).
Oct. 24	Motion to dismiss. (U.S.A.)
24	Memo of law in support of Deft's motion to dismiss for failure to state a claim and opposition to convening of a 3-Judge Court and to Pltfs. request for injunctive relief
24	Affidavit of H. Dale Cook.
16	ORDER: Motion to proceed in forma pauperis is Granted. (10/13/72-JLK) as to Jose A. Clara.

Date	PROCEEDINGS
1972	
16	Motion & Order to Proceed In Forma Pauperis. (JLK-10/13/72)
25	Motion to Dismiss. (Deft.)
Nov. 10	Memo of law in opposition to motion to Dismiss. (Pltfs.)
20	Motion to Dtermine the Class, by Pltfs.
20	Memo of Law in Support of Motion to Determine the Class, by Pltfs.
21	Supplementary Memo of Law in Support of Deft's Motion to Dismiss and/or for Summary Judgment and in Opposition to Pltf's Memo of Law in Opposition to Motion to Dismiss, by Defts.
21	Affidavits of Manuel Levine, Bureau of Health Insurance of the Social Security Administration on behalf of the Gov't., concerning claim folders of Pltfs.
22	*ORDERED* (1) Deft's Motion to Dismiss is DENIED. (2) Pltfs shall submit their brief on the merits within 14 days. (3) Deft. shall submit his response within 14 days of service of pltfs' brief. (4) Pltf shall have 5 days within which to answer. (JLK-JE-DD-11/22/72)
28	Supplemental Memo of Law in Support of Deft's Motion to Dismiss and/or for Summary Judgment and in Opposition to Pltf's Memo of Law in Opposition to Motion to Dismiss, by DEFT.
Dec. 4	Transcript of deft's Motion to Dismiss on 11/22/72 @ 2:00 PM before a 3 Judge Court consisting of David W. Dyer, Joe Eaton and James Lawrence King. (pages 1-44—one volume).
11	Motion for Summary Judgment. (Pltfs.).

Date	PROCEEDINGS
1972	
11	Memo in Support of Pltfs.' Motion for Summary Judgment.
27	Memo of Law in Support of Deft.'s Motion for Summary Judgment and in Opposition to Pltf.'s Motion for Summary Judgment. (Deft.).
1973	
Jan. 16	Reply Memo to Deft.'s Memo of Law in Support Deft.'s Motion for Summary Judgment and In Opposition to Pltfs.' Motion for Summary Judgment. (Pltf.).
22	Affidavit of Santiago Diaz.
22	Affidavit of Jose A. Clara.
Mar. 14	Motion to Substitute Party Deft. and Memo in Support Thereof. (Pltfs.).
30	ORDER SUBSTITUTING PARTY DEFT.: ORDERED that Casper Wineberger is substituted for Elliot Richardson as the named Party Deft. and the Clerk of the Court is directed to re-style the cause accordingly. (3/29/73-JLK-R#120).
June 11	Memo Opinion. (6/11/73-JLK).
20	Motion for Stay and Memo in Support of Motion. (Deft. USA).
21	ORDER: ORDERED that Deft.'s Motion for Stay is GRANTED for a period of 50 days. (6/21/73-JE for JLK).
29	Motion to Vacate Order Granting Defts.' Motion to Stay and Memo in Support Thereof and Memo in Opposition to Defts.' Motion to Stay. (Pltfs.).
July 23	Motion for Entry of Judgment. (Deft.).

Date	PROCEEDINGS
1973	
Aug. 7	ORDER: Pltfs.' motion to vacate the stay entered by the Court on 6/21/73, is vacated. ORDERED that Deft.'s Motion for entry of Final Judgment is GRANTED. (8/7/73-DD-JE-JLK).
7	FINAL JUDGMENT: ORDERED that Pltfs.' Motion for Summary Judgment and their prayer for final declaratory and injunctive relief on behalf of themselves and the class and sub-class certified is GRANTED and Deft.'s Motion for Summary Judgment is DENIED in accordance with the court's memo opinion of 6/11/73, and for the reasons set forth therein. (8/73-DD-JE-JLK-R#123).
10	Motion for Stay Pending Appeal to the U.S. Supreme Court. (Deft.)
16	Letter from U.S. Attorney to Judge King, Re: Santiago Diaz, et al V. Caspar W. Weinberger, etc. Appropriate provisions Fed. Rules Of Civil Procedure. (Clemens Hagglud, Chief Civil Div.)
16	Memorandum In Opposition To Defts' Motion For Stay Pending Appeal. (Atty. for Pltfs'—Legal Services of Greater Miami, Inc.)
21	ORDER Denying Stay Pending Appeal. Defts. Motion for Issuance of a Stay Pending Appeal to the United States Supreme Court be and the same is hereby DENIED. (8/17/73-JLK)
Sept. 4	ORDER Correcting Clerical Errors. (8/30/73-JLK).
6	Notice of Appeal by the United States of America from the order dated 8/7/73. (Copies to Judges Eaton and King. Alfred Feinberg, U.S.C.A. and Court Reporter).

CLERK'S CERTIFICATE

Certified to be a true and correct copy of the original.

JOSEPH I. BOGART
Clerk
U. S. District Court
Southern Dist. of Fla.

By /s/ R. I. Greene
Deputy Clerk
Date: 10/10/23

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE
SOUTHERN DISTRICT OF FLORIDA

Case No. 72-1312-Civ-JLK

[Title Omitted]

[Filed Aug. 18, 1972]

COMPLAINT

(CLASS ACTION)

(Three Judge Court)

1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1361 and/or 5 U.S.C. § 701 et seq. and/or 28 U.S.C. § 1331 and/or 42 U.S.C. § 405(g). This action seeks to review a decision of the Social Security Administration, a Division of the Department of Health, Education and Welfare, rejecting Plaintiff's application for Health Insurance for the Aged (Medicare), and to compel the Secretary to enroll Plaintiff in the Medicare Program. This action further seeks redress of a violation of the rights, privileges and immunities of the Plaintiff secured by the Fifth Amendment to the United States Constitution, as also to enjoin the enforcement of, and pursuant to 28 U.S.C. § 2201, to declare unconstitutional 42 U.S.C. § 1395o.(2)(A)(i) and (ii) requiring as an eligibility requirement for Health Insurance for the Aged either citizenship or lawful admission for permanent residence in the United States continuously during the five (5) years immediately preceding the month of application for enrollment. Plaintiff's inability to meet the eligibility requirements under constitutional attack herein has deprived and will deprive him of more than $10,000 (Ten Thousand and 00/100 Dollars) worth of medical benefits to which he would otherwise be entitled without cost under the Medicare Program.

2. Plaintiff seeks a preliminary and permanent injunction restraining the enforcement, operation and execution of an Act of Congress, to wit: 42 U.S.C. § 1395o.(2)(A)(ii), for repugnance to the Constitution of the United States. Accordingly, pursuant to 28 U.S.C. § 2282 Plaintiff's claim must be heard and determined by a District Court of three Judges composed pursuant to the requirements of 28 U.S.C. § 2284.

3. On or about June 18, 1972 Plaintiff applied for enrollment under the Congressionally created Health Insurance Plan for the Aged, 42 U.S.C. § 1395 et. seq. Plaintiff is an alien lawfully admitted to the United States who has not resided therein continuously during the five (5) years immediately preceeding the month in which he applied for enrollment. Except for Plaintiff's alienage and his failure to continuously reside in the United States for a period of five (5) years immediately preceeding the month in which he applied for enrollment in the Medicare Program, Plaintiff is fully qualified for enrollment in said Program. On August 4, 1972 Plaintiff received a formal letter of rejection for having "not resided in the United States for a required period of time." (See Exhibit "A" attached hereto and made a part hereof).

CLASS ACTION ALLEGATIONS

4. This is a class action pursuant to Rule 23(b)(2) F.R.C.P. This class which Plaintiff represents consists of all persons in the United States who have been or will be denied enrollment under the Medicare Program, 42 U.S.C. § 1395 et seq. because of their failure to meet the citizenship and residency requirements of 42 U.S.C. § 1395o.(2)(A)(i) or (ii). The class is so numerous that joinder of all members is impracticable. Defendant has refused to act on grounds generally applicable to Plaintiff's class thereby making appropriate final injunctive and/or corresponding declaratory relief with respect to the class. There are questions of law and fact common to the class. The claims of the Plaintiff are typical of the claims of the members of the class and

Plaintiff will fairly and adequately protect the interests of the class.

5. Sec. 1395o.(2)(A)(i) and (ii) of 42 U.SC. is unconstitutional in that it denies the equal protection of the laws of the United States to aliens who are otherwise qualified and eligible for Medicare benefits.

6. Plaintiff has no viable or available administrative remedies; Plaintiff has no adequate remedy of law.

WHEREFORE, and for the foregoing reasons, Plaintiff respectfully prays as follows:

(a) That this Court assume jurisdiction of this cause pursuant to 28 U.S.C. § 1331, 42 U.S.C. § 405(g), 28 U.S.C. § 1361 and/or 5 U.S.C. § 701.

(b) That this Court will enter an order determining the class to be all persons denied enrollment in the Health Insurance Program for the Aged (Medicare) solely on account of their alienage and their failure to continuously reside in the United States for five (5) years immediately preceeding the month of their application for enrollment.

(c) That this Court enter a declaratory judgement pursuant to 28 U.S.C. § 2201 declaring that 42 U.S.C. § 1395o.(2)(A)(i) and (ii) is unconstitutional and violative of the Due Process Clause of the Fifth Amendment to the United States Constitution.

(d) That the Court enter a Preliminary Injunction requiring the Defendant to forthwith approve all applicants for enrollment in the Medicare Program who have been denied eligibility solely for failing to comply with 42 U.S.C. § 1395o.(2)(A)(i) and (ii).

(e) That the Court enter a permanent injunction ordering the Defendant to enroll all applicants for Medicare whose applications have been denied solely by reason of their having failed to comply with the requirements of 42 U.S.C. § 1395o.(2)(A)(i) and (ii).

(f) That the Court order such appropriate and further relief as to this Court seems just.

Respectfully submitted,

/s/ Alfred Feinberg
ALFRED FEINBERG
Attorney for Plaintiff
LEGAL SERVICES OF GREATER MIAMI, INC.
395 Northwest First Street, Suite 202
Miami, Florida 33128
Telephone—379-0822

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Telephone 379-0822

Leo Adderly, Esq.
President

(Area Code 305)

Howard W. Dixon, Esq.
Executive Director

[SEAL]

September 20, 1972

Clerk, United States District Court
300 N.E. First Avenue
Miami, Florida

RE: *Diaz* v. *Richardson*
Case No. 72-1312-Civ-JLK

Dear Sir:

Enclosed please find Exhibit "A" which should have been attached to the Complaint filed in the above-styled cause but was not through inadvertence on our part.

Please be kind enough to deliver Exhibit "A" to the Judge for attachment to the Complaint in the Court's file.

Very truly yours,

/s/ Alfred Feinberg
ALFRED FEINBERG
Attorney for Plaintiff

Ahp

Enclosures

cc: Raymond B. Ray
United States Attorney

Elliot Richardson, Secretary
Department of Health, Education
and Welfare

[SEAL]

EXHIBIT "A"

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SOCIAL SECURITY ADMINISTRATION
Payment Center
Birmingham, Alabama 35203

Refer To Claim Number
267-29-2044 Santiago Diaz

Bureau of Retirement
and Survivors Insurance

August 4, 1972

Santiago Diaz
3690 NW 14 Ter
Miami, FL 33125

This refers to your claim for benefits under the Social Security Act.

You are not entitled to health insurance protection under the Social Security Act because you are not a United States citizen and have not resided in the U.S. for a required period of time. A person not entitled to social security benefit or railroad retirement annuity must be a citizen or must have been admitted to the United States for permanent residence and have actually resided in the U.S. for 5 years immediately before the month he filed for health insurance.

If you believe that this determination is not correct, you may request that your claim be reexamined. If you want this reconsideration, you must request it not later than 6 months from the date of this letter. You may make your request through any social security office. If additional evidence is available, you should submit it with your request. Please read the enclosed leaflet for a full explanation of your right to question the decision made on your claim.

If you have any questions about your claim, you should get in touch with any social security office. Most ques-

tions can be handled by telephone or mail. If you visit the office, however, please take this letter with you.

Sincerely yours,

/s/ C. R. Elder
C. R. ELDER
Chief, Claims Authorization Branch

Enclosure:
SSI-58

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

John R. Brown
Chief Judge
Houston, Texas 77002

August 29, 1972

Joseph I. Bogart, Clerk
Southern District of Florida
P. O. Box 669
Miami, Florida 33101

No. 72-1312-Civ-JLK—Diaz v. *Richardson*

My dear Mr. Bogart:

In response to the request of Judge Fulton, I have constituted the Court in accordance with the enclosed designation order which I request you to file. I also enclose the pleadings, in reference to this matter, which were sent to me by Judge Fulton.

Copies of this order are being sent to the Judges.

Sincerely yours,

/s/ John R. Brown
JOHN R. BROWN

Enclosures

cc: Hon. David W. Dyer
Hon. Charles B. Fulton
Hon. Joe Eaton

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

[Title Omitted]

ORDER—DESIGNATION OF THREE JUDGE COURT

(1) Requesting Judge: Honorable Charles B. Fulton
Southern District of Florida

(2) District Judge: Honorable Joe Eaton
Southern District of Florida

(3) Circuit Judge: Honorable David W. Dyer
Southern District of Florida

(4) Date of Order: August 29, 1972

[Filed August 31, 1972]

The Requesting Judge (1) above named to whom an application for relief has been presented in the above cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and District Judge (2) named above to serve with the Requesting Judge (1) as members of, and with him to constitute the said Court to hear and determine the action.

This designation and composition of the three-Judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-Judge rather than a one-Judge court. This is a matter best determined by the three-Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such ques-

tions before the three-Judge panel either preliminarily or on the trial of the merits, or otherwise, as that Court thinks appropriate.

/s/ John R. Brown
JOHN R. BROWN
Chief Judge
Fifth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

[Title Omitted]

AMENDMENT TO ORDER DESIGNATING
THREE JUDGE COURT

[Filed September 7, 1973]

This order supersedes in part my order of August 29, 1972, constituting a 3-Judge Court in this case.

With the concurrences of all of the Judges concerned, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby reconstitute the 3-Judge Court to hear and determine this case as follows:

Honorable David W. Dyer
United States Circuit Judge

Honorable Joe Eaton
United States District Judge
Southern District of Florida

Honorable James Lawrence King
United States District Judge
Southern District of Florida

Entered this 5th day of September, 1972.

/s/ John R. Brown
JOHN R. BROWN
Chief Judge
Fifth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

[Title Omitted]

FIRST AMENDED COMPLAINT

(CLASS ACTION)

(Three Judge Court)

[Filed September 20, 1972]

1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1361 and/or 5 U.S.C. § 701 et seq. and/or 28 U.S.C. § 1331 and/or 42 U.S.C. § 405(g). This action seeks to review a decision of the Social Security Administration, a Division of the Department of Health, Education and Welfare, rejecting applications of Plaintiffs DIAZ and CLARA, for Health Insurance for the Aged (Medicare), for failing to meet citizenship or residency requirements, and to compel the Secretary of the Department of Health, Education and Welfare to enroll Plaintiffs, DIAZ and CLARA in the Medicare Program.

This action seeks redress by the Plaintiffs, ESPINOSA, DIAZ and CLARA for the denial of equal protection of the laws, specifically the denial of liberty without due process of law secured to Plaintiffs by the Fifth Amendment to the United States Constitution, as also, to enjoin the enforcement of, and pursuant to 28 U.S.C. § 2201, to declare unconstitutional the eligibility provision of the Health Insurance Plan for the Aged, 42 U.S.C. § 1395o-.(2)(A)(i) and (ii), requiring either citizenship or permanent resident status and continuous residence in the United States during the five (5) years immediately preceeding the month of application for enrollment.

Plaintiffs' inability to meet the eligibility requirements, under constitutional attack herein, has and will result in the deprivation to each of them of more than $10,000.00 (Ten Thousand and 00/100 Dollars) worth of medical benefits to which they would otherwise be entitled without cost under the Medicare Program.

2. Plaintiffs seek a preliminary and permanent injunction restraining the enforcement, operation and execution of an Act of Congress, to wit: 42 U.S.C. § 1395o.(2)(A)(i) and (ii) for repugnance to the Constitution of the United States. Accordingly, pursuant to 28 U.S.C. § 2282, Plaintiffs' claims must be heard and determined by a District Court of three Judges composed pursuant to the requirements of 28 U.S.C. § 2284.

3. Plaintiff ESPINOSA, age 73, is a permanent resident of the United States who has resided therein continuously since June 20, 1971. Plaintiff ESPINOSA desires to participate in the Medicare Program, but because of his failure to meet the requirement of 42 U.S.C. § 1395o.(2)(A)(ii), he has not attempted to enroll, such attempt being a futile gesture.

4. Plaintiffs DIAZ, age 77, and CLARA, age 67, are aliens lawfully admitted to the United States who have not resided therein continuously for the five (5) years immediately preceeding the month in which they applied for enrollment in the Medicare Program. Both Plaintiff DIAZ and Plaintiff CLARA attempted to enroll in the Medicare Program but on August 4, 1972 received formal letters of rejection from the Social Security Administration for having "not resided in the United States for a required period of time." (See Exhibits "A" (DIAZ) and "B" (CLARA) attached hereto and made a part hereof.)

5. Plaintiffs, ESPINOSA, DIAZ and CLARA, except for their inability to meet the requirements of 42 U.S.C. § 1395o.(2)(A)(ii) aforesaid, fully qualify for enrollment in the Medicare Program and meet all other eligibility prerequisites as required by law. Plaintiffs do not qualify for hospital insurance benefits under 42 U.S.C. § 1395o.(2)(B).

Class Action Allegations

6. This is a class action pursuant to Rule 23(b)(2) F.R.C.P. The class which Plaintiffs represent consists of all persons in the United States who have been or will be denied enrollment under the Medicare Program, 42

U.S.C. § 1395 et. seq. because of their failure to meet the citizenship or residency requirements of 42 U.S.C. § 1395o.(2)(A)(i) and (ii) respectively.

Pursuant to Rule 23(c)(4)(B) F.R.C.P. this class contains one sub-class: All non-citizens in the United States who have attained permanent resident status, who have been or will be denied enrollment under the Medicare Program because of their failure to meet the five (5) year continuous residency requirement of 42 U.S.C. § 1395o.(2)(A)(ii). This sub-class is represented in the within action by Plaintiff ESPINOSA. The class and sub-class are so numerous that joinder of all members is impracticable. Defendant has refused to act on grounds generally applicable to the class and sub-class thereby making appropriate final injunctive and/or corresponding declaratory relief. There are questions of law and fact common to the members of both the class and sub-class. The claims of the Plaintiffs are typical of the claims of the members of their class and sub-class and the Plaintiffs will fairly and adequately protect the interests of the members of the class and sub-class.

7. Sec. 1395o.(2)(A)(i) and (ii) of 42 U.S.C. is unconstitutional in that it denies the equal protection of the laws of the United States to aliens who are otherwise qualified and eligible for Medicare benefits.

8. Plaintiffs have no viable or available administrative remedies; Plaintiffs have no adequate remedy of law.

WHEREFORE, and for the foregoing reasons Plaintiffs respectfully pray as follows:

(a) That this Court assume jurisdiction of this cause pursuant to 28 U.S.C. § 1331, 42 U.S.C. § 405(g), 28 U.S.C. § 1361 and/or 5 U.S.C. § 701.

(b) That this Court will enter an Order determining the class to be all persons denied enrollment in the Health Insurance Program for the Aged (Medicare) solely on account of their alienage and their failure to continuously reside in the United States for five (5) years immediately preceeding the month of their application for enrollment.

(c) That this Court will enter an Order determining

the sub-class represented by Plaintiff ESPINOSA to be all non-citizens lawfully residing in the United States who have attained permanent resident status, but have not continuously resided therein for a period of five (5) years.

(d) That this Court enter a declaratory judgement pursuant to 28 U.S.C. § 2201 declaring that 42 U.S.C. § 1395o.(2)(A)(i) and (ii) is unconstitutional and violative of the Due Process Clause of the Fifth Amendment to the United States Constitution.

(e) That the Court enter a Preliminary Injunction requiring the Defendant to forthwith approve all applicants for enrollment in the Medicare Program who have been denied eligibility solely for failing to comply with 42 U.S.C. § 1395o.(2)(A)(i) and (ii).

(f) That the Court enter a permanent injunction ordering the Defendants to enroll all applicants for Medicare whose applications have been denied solely by reason of their having failed to comply with the requirements of 42 U.S.C. § 1395o.(2)(A)(i) and (ii).

(g) That the Court order such appropriate and further relief as to this Court seems just.

Respectfully submitted,

/s/ Alfred Feinberg
ALFRED FEINBERG
Attorney for Plaintiffs
LEGAL SERVICES OF GREATER MIAMI, INC.
395 Northwest First Street, Suite 202
Miami, Florida 33128
Telephone—379-0822

EXHIBIT "A"

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
Payment Center
Birmingham, Alabama 35203

Refer To Claim Number
267-29-2044 Santiago Diaz

Bureau of Retirement and Survivors Insurance

August 4, 1972

Santiago Diaz
3690 NW 14 Ter
Miami, FL 33125

This refers to your claim for benefits under the Social Security Act.

You are not entitled to health insurance protection under the Social Security Act because you are not a United States citizen and have not resided in the U.S. for a required period of time. A person not entitled to social security benefit or railroad retirement annuity must be a citizen or must have been admitted to the United States for permanent residence and have actually resided in the U.S. for 5 years immediately before the month he filed for health insurance.

If you believe that this determination is not correct, you may request that your claim be reexamined. If you want this reconsideration, you must request it not later than 6 months from the date of this letter. You may make your request through any social security office. If additional evidence is available, you should submit it with your request. Please read the enclosed leaflet for a full explanation of your right to question the decision made on your claim.

If you have any questions about your claim, you should get in touch with any social security office. Most ques-

tions can be handled by telephone or mail. If you visit the office, however, please take this letter with you.

Sincerely yours,

/s/ C. R. Elder
C. R. ELDER
Chief, Claims Authorization Branch

Enclosure:
SSI-58

EXHIBIT "B"

[SEAL]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SOCIAL SECURITY ADMINISTRATION
Payment Center
Birmingham, Alabama 35203

Refer To Claim Number
266-31-2607 Jose A. Clara

Bureau of Retirement
and Survivors Insurance

August 4, 1972

Jose A. Clara
1330 W 29 St Apt 14
Miami, FL 33012

This refers to your claim for benefits under the Social Security Act.
You are not entitled to health insurance protection under the Social Security Act because you are not a United States citizen and have not resided in the U.S. for a required period of time. A person not entitled to social security benefit or railroad retirement annuity must be a citizen or must have been admitted to the United States for permanent residence and have actually resided in the U.S. for 5 years immediately before the month he filed for health insurance.

If you believe that this determination is not correct, you may request that your claim be reexamined. If you want this reconsideration, you must request it not later than 6 months from the date of this letter. You may make your request through any social security office. If additional evidence is available, you should submit it with your request. Please read the enclosed leaflet for a full explanation of your right to question the decision made on your claim.

If you have any questions about your claim, you should get in touch with any social security office. Most ques-

tions can be handled by telephone or mail. If you visit the office, however, please take this letter with you.

Sincerely yours,

/s/ C. R. Elder
C. R. ELDER
Chief, Claims Authorization Branch

Enclosure:
SSI-58

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE
SOUTHERN DISTRICT OF FLORIDA

Case No. 72-1312—Civ-JLK

[Title Omitted]

ORDER GRANTING PLAINTIFF'S MOTION TO ADD PARTIES PLAINTIFF AND PLAINTIFF'S MOTION TO FILE AN AMENDED COMPLAINT

[Filed September 28, 1972]

THIS CAUSE, having come on to be heard upon Plaintiff's Motion to Add Parties Plaintiff and to file an Amended Complaint and the Court being fully informed in the premises, it is upon consideration,

ORDERED AND ADJUDGED, that Plaintiff's Motion to Add Parties Plaintiff CLARA and ESPINOSA be and the same is hereby granted, and it is further

ORDERED AND ADJUDGED that Plaintiff's Motion to File a First Amended Complaint be and the same is hereby granted and Plaintiff's First Amended Complaint shall be deemed filed as of the date hereof.

The Clerk of the within Court shall re-style the cause as indicated by Plaintiff's First Amended Complaint.

DONE AND ORDERED in Chambers in Miami, Dade County, Florida this 28 day of Sept., 1972.

/s/ James Lawrence King
JAMES LAWRENCE KING
United States District Court Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 72-1312—Civ-JLK

[Title Omitted]

MOTION TO DISMISS

[Filed October 24, 1972]

COMES NOW the United States of America, by and through its undersigned United States Attorney, and moves this Court to dismiss the Complaint in the above entitled action on the following grounds:

1. The plaintiffs have failed to allege sufficient grounds to invoke jurisdiction and convening of a Three-Judge Court pursuant to 28 U.S.C. 2282.
2. The plaintiffs have not shown they are entitled to injunctive relief.
3. The Court lacks jurisdiction over the subject matter in that the plaintiffs have failed to exhaust remedies pursuant to Social Security Act as set out in the attached Memorandum of Law and Affidavit.

ROBERT W. RUST
United States Attorney

By: /s/ Raymond B. Ray
RAYMOND B. RAY
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have mailed a true copy of the foregoing to Legal Services of Greater Miami, Inc. 395 Northwest First Street, Suite 202, Miami, Florida 33128, this 24 day of October, 1972.

/s/ Raymond B. Ray
RAYMOND B. RAY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTPICT OF FLORIDA

Civil Action No. 72-1312—Civ-JLK

[Title Omitted]

[Filed October 24, 1972]

AFFIDAVIT OF H. DALE COOK

COUNTY OF ARLINGTON)
) ss
STATE OF VIRGINIA)

I, H. DALE COOK, being first duly sworn, depose and say as follows:

(1) I am Chairman of the Appeals Council and Director of the Bureau of Hearings and Appeals, Social Security Administration, Department of Health, Education, and Welfare. The Bureau of Hearings and Appeals includes, besides the Appeals Council itself, administrative law judges, formerly called "hearing examiners," who hold hearings on claims arising under title II and title XVIII of the Social Security Act, as amended, when such hearing is duly requested by a claimant who is dissatisfied with the administrative determination of his claim.

(2) Section 1869(a) of the Social Security Act, 42 U.S.C.A. 1395ff(a), provides that a determination of whether an individual is entitled to benefits under Part A or Part B of title XVIII, shall be made by the Secretary in accordance with regulations prescribed by him.

Section 1869(b), 42 U.S.C.A. 1395ff(b), provides that any individual dissatisfied with any determination as to entitlement under Part A or Part B of title XVIII, shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 205(b) of the Act, 42 U.S.C.A. 405(b), and, in the case of a determination as to entitlement, to judicial review of the Secre-

tary's final decision after such hearing as is provided in section 205(g) of the Act, 42 U.S.C.A. 405(g).

(3) One of the functions of the Appeals Council is to pass upon requests for review of hearing decisions rendered by the administrative law judges and to either grant, deny or dismiss any such request. Under the regulations and practice of the Social Security Administration, if the Appeals Council grants a timely request for review of a hearing decision, the Appeals Council then may either make a decision in such case or remand the case to an administrative law judge for a hearing decision. If the Appeals Council makes a decision, the Appeals Council's decision thereupon becomes the "final decision" within the meaning of, and subject to, the provisions for judicial review in section 205(g) of the Social Security Act, as amended, 42 U.S.C.A. section 405(g), the first sentence of which reads as follows:

> "Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. * * *"

(4) A determination with respect to entitlement under Part A under section 226 of the Act (42 U.S.C.A. 426) or section 103 of the Social Security Amendments of 1965 (42 U.S.C.A. 426a) or enrollment under Part B is an initial determination under section 404.905(a) of Regulations No. 4 of the Social Security Administration, 20 CFR 404.905(a). See also sections 405.705(a) and (b) of Regulations No. 5 of the Social Security Administration, 20 CFR 405.705(a) and (b). As such, the provisions of Regulations No. 4 are applicable to these determinations.

(5) Section 404.908 of the aforesaid regulations (20 CFR 404.908) provides that an initial determination shall be final and binding unless it is reconsidered (or unless it is revised in accordance with section 404.956 which is not pertinent herein).

As pertinent here, sections 404.909 to 404.911 of the aforesaid regulations (20 CFR 404.909 to 404.911) provide that any party who is dissatisfied with an initial determination may request that the Administration reconsider such determination. Such reconsideration request must be in writing and filed with the Social Security Administration within six months from the date of mailing notice of the initial determination unless such time is extended as provided in section 404.953 of the aforesaid regulations (20 CFR 404.953).

(6) As pertinent here, section 404.917 of the aforesaid regulations (20 CFR 404.917) provides that an individual has a right to a hearing about any matter designated in section 404.905 (20 CFR 404.905) if an initial determination and a reconsideration of the initial determination have been made by the Administration.

It is provided in the aforesaid regulations at section 404.945 (20 CFR 404.945) that where an administrative law judge has made a decision or dismissed a request for hearing, any party thereto may request the Appeals Council to review such decision or dismissal. Only after the Appeals Council issues a decision or denies review may there be judicial review of a determination under sections 205(g) and 1869 of the Act, *supra*.

(7) In accordance with the provisions of section 404-.902 of Social Security Administration Regulations No. 4 (20 CFR 404.902), as pertinent here, the Social Security Administration Payment Center has jurisdiction for making initial determinations and reconsidered determinations with respect to the entitlement of an individual under titles II and XVIII of the Social Security Act.

(8) I am responsible for the maintenance of Departmental files relating to functions performed by administrative law judges and the Appeals Council on claims arising under title II and title XVIII of the Social Security Act, as amended, including decisions and orders therein and correspondence in reference thereto. The official files maintained by the Bureau of Hearings and Appeals relating to the claims of the plaintiffs, SANTIAGO DIAZ and JOSE A. CLARA, under title II and title XVIII of the Social Security Act, were examined

under my supervision, and to the best of my knowledge and belief said files show that:

(a) On June 15, 1972, the plaintiffs, SANTIAGO DIAZ and JOSE A. CLARA, filed applications for health insurance entitlement under Parts A and B of title XVIII of the Social Security Act and for any cash benefits to which they might be entitled under title II of the Act. The Birmingham, Alabama, Payment Center of the Social Security Administration initially determined that the plaintiffs were not entitled to health insurance protection. Their claims were denied under section 103 of the Social Security Amendments of 1965 *supra* and section 1836 (2)(A)(ii) (42 U.S.C. 1395o(2)(A)(ii)) because they were neither United States citizens nor aliens admitted for permanent residence with five years of continuous residence in the United States. Notices of the initial determinations were sent to the plaintiffs on August 4, 1972.

(b) I have personally directed that a thorough search be conducted of the Departmental files maintained by the Bureau of Hearings and Appeals with respect to the plaintiff, VICTOR CARLOS ESPINOSA. No record was found of this plaintiff having filed any request for hearing or of any decision or order having been rendered by either an administrative law judge or the Appeals Council concerning any title II or title XVIII claim wherein this plaintiff was a party.

(9) Since the only determination on the merits was the initial determination of which notice was given on August 4, 1972, to the plaintiffs, SANTIAGO DIAZ and JOSE A. CLARA, and since there has been no determination on the merits with respect to the plaintiff, VICTOR CARLOS ESPINOSA, none of the plaintiffs have exhausted their administrative remedies.

(10) To the best of my knowledge, information and belief, the plaintiffs' complaint fails to state a cause of action for which relief can be granted under the provisions of sections 1869 and 205(g) of the Social Security Act, as amended, 42 U.S.C.A. sections 1395ff and 405 (g), in that the plaintiffs have not been parties to any

"final decision of the Secretary made after a hearing" with respect to any title II or title XVIII proceeding.

/s/ H. Dale Cook
H. DALE COOK

Subscribed and sworn to before me this 18 day of October, 1972.

/s/ Marvin E. Leas
Notary Public
County of Arlington
State of Virginia
My Commission Expires 7 Sept. 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Title Omitted]

MOTION TO DISMISS
[Filed October 25, 1972]

COMES NOW the United States of America, by and through its undersigned United States Attorney, and moves this Court to dismiss the Complaint in the above entitled action on the following grounds:

1. The plaintiffs have failed to allege sufficient grounds to invoke jurisdiction and convening of a Three-Judge Court pursuant to 28 U.S.C. 2282.
2. The plaintiffs have not shown they are entitled to injunctive relief.
3. The Court lacks jurisdiction over the subject matter in that the plaintiffs have failed to exhaust remedies pursuant to Social Security Act as set out in the attached Memorandum of Law and Affidavit.

ROBERT W. RUST
United States Attorney

By:

RAYMOND B. RAY
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

[Title Omitted]

AFFIDAVIT OF MANUEL LEVINE
[Filed November 21, 1972]

COUNTY OF BALTIMORE)
) ss
STATE OF MARYLAND)

I, MANUEL LEVINE, being duly sworn, depose and say as follows:

(1) I am an employee of the Bureau of Health Insurance of the Social Security Administration to which the Secretary of Health, Education, and Welfare (hereinafter referred to as the Secretary) has delegated authority (42 U.S.C. 405) for the administration of the programs of health insurance in Title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.).

(2) I have examined the claims folders of the plaintiffs Santiago Diaz and Jose A. Clara and have ascertained the following:

(3) Plaintiff Santiago Diaz filed application on June 15, 1972 for hospital insurance under Part A of Title XVIII of the Social Security Act. He also indicated an intent to enroll in the supplementary medical insurance program of Part B. In his application, he gave as his date of birth, December 30, 1896 and stated that he was born in Cuba.

(4) By checking appropriate checkblocks marked "Yes" or "No", plaintiff Diaz indicated in his application that he is a resident of the United States, but not a citizen of the United States.

(5) Question 12(b) of the application reads as follows: "Are you lawfully admitted for permanent residence in the United States?" With respect to this question, plaintiff Diaz checked the box marked "No". In that part of the application labeled "Remarks", he stated as follows: "I entered U.S.A. on 2/4/71. I have not yet applied for

a change in my status in this country. My wife entered U.S.A. on same date as I did and is not either a permanent resident yet."

(6) The file contains a registration card with the United States Cuban Refugee Center. Plaintiff Diaz gave his birth date as December 30, 1896, and the registration with the Center was on February 4, 1971. The file also contains an application for a social security account number, in which he stated that he was born on December 30, 1896, in Cuba.

(7) At the time plaintiff Diaz filed his application, a district office claims representative explained to Mr. Diaz that he did not meet the requirement of lawful admission for permanent residence with five years of continuous residence in the United States. The plaintiff at this time stated that he had never worked in covered employment.

(8) The social security earnings record of plaintiff Diaz shows no covered earnings at any time, as of June 21, 1972.

(9) Based on the stated birth date of plaintiff Diaz, the Secretary made an initial determination that he would need no quarters of coverage in order to qualify for hospital insurance coverage under the transitional insured status provisions of Section 103 of the Social Security Amendments of 1965, 42 U.S.C. 426a. However, in order to so qualify, and to be eligible to enroll in the supplementary medical insurance program of Part B he must be an alien lawfully admitted for permanent residence and have resided in the United States for a continuous period of five years immediately preceding the date of application.

(10) On August 4, 1972 the claim of plaintiff Diaz was denied initially by the Secretary on the basis that he was not a citizen of the United States and was not an alien lawfully admitted for permanent residence. Moreover, the Secretary determined that he had not resided in the United States for a continuous period of five years. Plaintiff Diaz was notified in writing of this determination and of his right to reconsideration. Plaintiff Diaz has not requested reconsideration of this denial.

(11) Plaintiff Jose A. Clara filed application for hospital insurance on June 15, 1972. He also indicated an intent to enroll in the supplementary medical insurance program of Part B. He stated in his application that he was born on September 22, 1905, in Cuba.

(12) As with plaintiff Diaz (paragraph 4, *supra*), plaintiff Clara indicated that he was a resident of the United States but was not a citizen.

(13) He also checked "No" to question 12(b) asking "Are you lawfully admitted for permanent residence in the United States?" In the space for "Remarks", he stated: "I entered U.S.A. on 7/8/71. I have not yet applied for a change in my status in this country. My wife arrived with me."

(14) The file contains a registration card with the United States Cuban Refugee Center. Plaintiff Clara gave his birth date as September 22, 1905, and the registration with the Center was on July 28, 1971. The file also contains an application for a social security account number, in which he stated that he was born on September 22, 1905, in Cuba.

(15) The social security earnings record of plaintiff Clara shows no covered earnings at any time, as of June 20, 1972.

(16) Based on the stated birth date of plaintiff Clara, the Secretary made an initial determination that he would need 9 quarters of coverage in order to qualify for hospital insurance coverage under the transitional insured status provisions of section 103 of the Social Security Amendments of 1965, 42 U.S.C. 426a. In addition, to so qualify and to be eligible to enroll in the supplementary medical insurance program of Part B, he must be an alien lawfully admitted for permanent residence and have resided in the United States for a continuous period of five years immediately preceding the date of application.

(17) On August 4, 1972, the claim of plaintiff Clara was denied initially by the Secretary on the basis that he was not a citizen of the United States and was not an alien lawfully admitted for permanent residence. Moreover, the Secretary determined that he had not resided in the United States for a continuous period of five years.

The Secretary also made an initial determination that he lacked the requisite number of quarters of coverage for entitlement under section 103, *supra*. Plaintiff Clara was notified in writing of this determination and of his right to reconsideration. Plaintiff Clara has not requested reconsideration of this denial.

(18) I have no information with respect to the claim of plaintiff Victor Carlos Espinosa.

/s/ Manuel Levine
MANUEL LEVINE
Bureau of Health Insurance
Social Security Administration
Department of Health, Education, and Welfare

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Title Omitted]

ORDER DENYING MOTION TO DISMISS
[Filed November 22, 1972]

This action came on before a three-judge court consisting of David W. Dyer, United States Circuit Judge, Joe Eaton, United States District Judge and James Lawrence King, United States District Judge, in argument on defendant's motion to dismiss. The court, having considered the pleadings, argument and stipulation of the parties in open court, finds and concludes that this court properly has jurisdiction. Moreover, the parties have stipulated that no factual issues are in dispute and that this case may be decided on cross motion for summary judgment without further oral argument. Therefore it is,

ORDERED and ADJUDGED that:

1. Defendant's motion to dismiss be and the same is hereby denied.
2. Plaintiffs shall submit their brief on the merits within fourteen (14) days of the date of this order.
3. Defendant shall submit his response within fourteen (14) days of service of plaintiffs' brief.
4. Plaintiffs shall have five (5) days from service of defendant's response within which to answer, if they so choose.

DONE and ORDERED in chambers at Miami, Florida, this 22nd day of November, 1972.

/s/ David W. Dyer
DAVID W. DYER
United States Circuit Judge

/s/ Joe Eaton
JOE EATON
United States District Judge

/s/ James Lawrence King
JAMES LAWRENCE KING
United States District Judge

cc: Alfred Feinberg, Esq.
United States Attorney

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE
SOUTHERN DISTRICT OF FLORIDA

[Title Omitted]

MOTION FOR SUMMARY JUDGMENT
[Filed December 11, 1972]

Plaintiffs, by and through their undersigned counsel respectfully move this Honorable Court for a Summary Judgement and in support thereof state that there are no issues of disputed fact which remain to be decided by the Court.

Respectfully submitted,

/s/ Alfred Feinberg
ALFRED FEINBERG
Attorney for Plaintiffs
LEGAL SERVICES OF GREATER MIAMI, INC.
395 Northwest First Street, Suite 202
Miami, Florida 33128
Telephone—379-0822

EXHIBIT "A"
MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

CUBAN REFUGEE CENTER - WEEKLY STATISTICAL REPORT

PERIOD November 13-17, 1972

PART A: TOTAL PROGRAM REPORT

I - REGISTRATIONS					II - RESETTLEMENTS							
	THIS WEEK		CUMULATIVE *		THIS WEEK				CUMULATIVE *			
	Cases	Persons	Cases	Persons	Single Cases	Family Cases	Total Cases	Total Persons	Single Cases	Family Cases	Total Cases	Total Persons
USCC	12	15	144,765	298,485	5	2	7	9	42,356	47,302	89,649	183,451
IRC	9	11	44,720	92,180	2	1	3	4	14,806	15,215	30,011	61,836
CWS	1	3	24,706	51,431	-	-	-	-	7,929	10,991	18,920	43,204
ETAS	-	-	2,321	4,481	-	-	-	-	429	854	1,283	2,838
TOTAL	22	29	216,512	446,387	7	3	10	13	65,520	74,362	139,883	291,329

PART B - AIRLIFT PERIOD - 1 DEC. - 1965 TO PRESENT

I - ARRIVALS					II - RESETTLEMENTS			
	THIS WEEK		AIRLIFT - PERIOD CUMULATIVE		THIS WEEK		AIRLIFT PERIOD CUMULATIVE	
	Cases	Persons	Cases	Persons	Cases	Persons	Cases	Persons
AIRLIFT	-	-	109,777	256,351	8	11	78,489	182,935
NON-AIRLIFT	22	28	14,925	23,397	2	2	9,540	18,486
CONSOLIDATED TOTAL	22	28	124,702	279,748	10	13	88,029	201,421

% of total Resettlements to total Arrivals since 1 Dec/65	72.0 %
% Of total Resettlements to total Registration since Jan/61	66.3 %
No. of last Airlift flight arriving Friday - was -	

CREC 182 (3-20-70) * Since January 1961

BEST COPY AVAILABLE

CUBAN REFUGEE PROGRAM

CONSOLIDATED REPORT OF OVERALL OPERATIONS

Month of January 1963(*)

	Arrivals and Registrations		Resettlements	
	Monthly	Cum. since 12/1/65	Monthly	Cum. since 12/1/65
AIRLIFT:				
Arrivals	3,062	96,700		
Registrations	3,015	83,531	2,678	68,439
OTHER:				
Registrations	321	7,326	273	11,478 (**)
TOTAL	3,336	90,857	2,951	79,917

(All figures cumulative since Dec. 1, 1965)

Total Airlift arrivals	96,700
Total Other registrations	7,326
Total cumulative Airlift arrivals and Other registrations ...	104,036
Total resettlement (Airlift and Other)	79,917
Percentage of total resettlements to total registrations and arrivals	77%

Remarks: (*) Covers from 12/30/62 through 2/2/63 or 5 weeks period.

(**) This total includes other arrivals and numerous refugees who resided in the Miami area before the Airlift began.

RCS/SU

EXHIBIT "B"

41

BEST COPY AVAILABLE

MONTH OF January 1968 (*)

AIRLIFT ARRIVALS — CUMULATIVE (Since Dec.1, 1965 to 2/2/68)

		%
Men	25,741	27
Women	38,378	40
Children	31,589	33
Total arrivals as of 2/2/68	96,708	100

Age categories and Occupations:

AGES	Month of January	12/1/65 - 2-2-68 Cumulative	% (Cum.)
0- 5	425	12,119	12.5
6-18	830	20,221	20.9
19-29	382	9,650	10.0
30-39	635	18,342	19.0
40-49	510	15,393	15.9
50-60	451	10,663	11.0
61-65	185	3,991	4.1
over 65	292	6,389	6.6
TOTALS	3862	96,708	100.0
OCCUPATIONS:			
Professional, Semi-Pro. & Managerial	215	6,688	6.9
Clerical & Sales	485	11,535	11.9
Skilled	382	8,253	8.6
Semi-Skilled & Un-skilled	96	3,335	3.5
Services	123	3,104	3.2
Agricultural & fishery	66	1,562	1.6
Students, Children & Housewives	2,490	62,173	64.3
TOTALS	3,862	96,708	100.0

Remarks: (*) The month of JANUARY covers 5 weeks period. (12/30/67 2/2/68)

RCS/SU

EXHIBIT "B"

42

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CUBAN REFUGEE PROGRAM

CONSOLIDATED REPORT OF OVERALL OPERATION

Month of October 1972 (*)

	Arrivals and Registrations		Resettlements	
	Monthly	Cum. since 12/1/65	Monthly	Cum. since 12/1/65
AIRLIFT Arrivals	-	256,351	70	182,904
Registrations	68	239,488		
OTHER Registrations	212	23,337	8	18,482 (**)
TOTAL	280	262,825	78	201,386

(All figures cumulative since Dec. 1, 1965)

Total Airlift arrivals	256,351
Total Other registrations	23,337
Total cumulative Airlift arrivals and other registrations	279,688
Total resettlement (Airlift and Other)	201,386
Percentage of total resettlements to total registrations and arrivals	72.0%

Remarks: (*) Covers from September 30, 1972 through October 31, 1972 or 5 weeks period.

(**) This total includes other arrivals and numerous refugees who resided in the Miami area before the Airlift began.

AM/CU
CR33-325 (4-4-68)

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EXHIBIT "C"

MONTH OF October (*)

AIRLIFT ARRIVALS — CUMULATIVE (Since Dec.1, 1965 to October 31, 1972

Men	71,343	27.8 %
Women	97,864	38.2
Children	87,144	34.0
Total arrivals as of October 31, 1972	256,351	100.0 %

AGE CATEGORIES AND OCCUPATIONS:

AGE	Month of October	12/1/65 - 10/31/72 Cumulative	% (Cum.)
0 - 5	-	25,903	10.1 %
6 - 18	-	62,089	24.2
19 - 29	-	22,024	8.6
30 - 39	-	49,823	19.5
40 - 49	-	40,195	15.7
50 - 60	-	26,658	10.4
61 - 65	-	10,540	4.1
over 65	-	19,099	7.4
TOTAL	-	256,351	100.%
OCCUPATIONS:			
Professional, Semi-Pro. & Managerial	-	15,285	6.0%
Clerical & Sales	-	28,831	11.2
Skilled	-	23,151	9.0
Semi-Skilled & Un-skilled	-	10,792	4.2
Services	-	8,068	3.2
Agricultural & fishery	-	5,256	2.1
Students, Children & Housewives	-	164,968	64.3
TOTAL	-	256,351	100.%

Remarks: (*) The month of October covers weeks period.

(9/30/72 - 10/31/72)

RCS/SU
CREC 125 A (4-4-68)

EXHIBIT "C$_3$"

44

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Title Omitted]

MEMORANDUM OPINION

[Filed June 11, 1973]

Before DYER, Circuit Judge, EATON and KING, District Judges.

JAMES LAWRENCE KING, District Judge: This action challenges the constitutionality of the eligibility requirement for aliens who wish to enroll in the supplemental medical insurance plan established as part of the Medicare program. Section 1836(2)(A)(ii) of the Social Security Act of 1935, *as amended*, 42 U.S.C. § 1395o (2)(A)(ii) (1970), disqualifies all aliens from benefits but those lawfully admitted for permanent residence who have resided in the United States continuously for five years prior to making application for enrollment.[1]

The supplemental medical insurance program, 42 U.S.C. § 1395j *et seq.* (1970), pays a substantial part of the cost of physicians' services, home health care, diagnostic tests, and medical appliances. 42 U.S.C. §§ 1395k, 1395x (m) and (s) (1970). Unlike Medicare's companion hospital insurance plan, 42 U.S.C. § 1395c *et seq.* (1970),

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[1] Section 1836 provides:

"Every individual who—

(1) has attained the age of 65, and

(2)(A) is a resident of the United States, and is either (i) a citizen or (ii) an alien lawfully admitted for permanent residence who has resided in the United States continuously during the 5 years immediately preceding the month in which he applies for enrollment under this part, or (B) is entitled to hospital insurance benefits under Part A,

is elegible to enroll in the insurance program established by this part."

42 U.S.C. § 1395o (1970).

one-half of the cost of the supplemental insurance program is financed by monthly premiums paid by individuals aged 65 or older who choose to enroll. 42 U.S.C. § 1395r(b) (1970).

Plaintiffs, who are Cuban refugees, seek injunctive and declaratory relief against operation of the alien eligibility provision on behalf of themselves, a class and sub-class of aliens similarly situated, pursuant to Fed. R. Civ. P. 23(a), (b)(2) and (c)(4). They charge that because the eligibility provision applies to aliens, but not to citizens, it discriminates invidiously against them in violation of the due process clause of the fifth amendment. A three-judge court was convened to consider their claim in accordance with 28 U.S.C. §§ 2282, 2284 (1970). The parties have stipulated, and we find, that no factual issues remain in dispute and that this action is ripe for decision on their opposing motions for summary judgment.

JURISDICTION

The court possesses jurisdiction pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g) (1970),[2] and we therefore need not consider the other

[2] Judicial review of supplemental medical insurance entitlement determinations is governed by Section 1869 of the Social Security Act of 1935, *as amended*, which provides in pertinent part:

> "Any individual dissatisfied with any determination . . . as to entitlement under . . . part B [the supplemental medical insurance plan] . . . shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 205(b) of this title, and, in the case of a determination as to entitlement . . . to judicial review of the Secretary's final decision after such hearing as is provided in section 205(g) of this title."

42 U.S.C. § 1395ff(b) (1970). Section 205(g) of the Act in turn provides in pertinent part:

> "Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision. . . . The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing."

42 U.S.C. § 405(g) (1970).

jurisdictional allegations of the complaint.[3] Although § 205(g) by its terms mandates a "final decision" by the Secretary prior to judicial review, to require plaintiffs to exhaust their administrative appeals would be to demand a futile act.

The purpose of § 205(g) is to "delay judicial review until (1) findings of fact are made by the Secretary or (2) the Secretary has had an opportunity to correct a lower level administrative error." *Morris* v. *Richardson*, 346 F.Supp. 494, 495 (N.D.Ga. 1972) (three-judge court, *appeal dismissed sub nom. Morris* v. *Weinberger*, —— U.S. —— (1973). Neither problem is presented here. No factual issues remain in dispute, and 42 U.S.C. § 1395o(2)(A)(ii) (1970) places the Secretary under a ministerial duty to deny plaintiffs' applications for enrollment for supplemental benefits. Under these circumstances, we think it unnecessary for the named plaintiffs, who have applied for benefits, to pursue formalistic administrative appeals of initial adverse determinations.

Likewise, the general exhaustion doctrine is inapplicable to this case because plaintiffs challenge the statute's constitutionality. It is settled that "[w]here a plaintiff attacks the constitutionality of the statute under which an administrative agency acts, and the attack does not turn upon a factual determination requiring administrative expertise, the doctrine of exhaustion of administrative remedies does not apply." *Gainville* v. *Richardson*, 319 F.Supp. 16, 18 (D. Mass. 1970) (three-judge court), *citing Public Util. Comm'n* v. *United States*, 355 U.S. 534, 539 (1958); *Oestereich* v. *Selective Serv. Bd.*, 393 U.S. 233, 242 (1968); *cf. King* v. *Smith*, 392 U.S. 312 n.4 (1968).

[3] Plaintiffs also alleged jurisdiction under 28 U.S.C. §§ 1331, 1361 and 5 U.S.C. § 702 (1970).

CLASS ACTION DEMAND

Plaintiffs have moved for certification of this case as a class action with one sub-class pursuant to Fed. R. Civ. P. 23(a), (b)(2) and (c)(4).[4] The parties have stipulated that plaintiffs Diaz and Clara are Cuban refugee immigrants who have been admitted for residence in the United States,[5] but who have neither resided in

[4] Plaintiffs' motion requested representation of a class consisting of:

> "All persons in the United States who have been or will be denied enrollment under the Medicare Program, 42 U.S.C. § 1395 *et seq.* because of their failure to meet the citizenship or residency requirements of 42 U.S.C. § 1395o(2)(A)(i) and (ii)."

They also sought to represent a sub-class of:

> "All non-citizens in the United States who have attained permanent resident status, who have been or will be denied enrollment under the Medicare Program because of their failure to meet the five-year continuous residency requirement of 42 U.S.C. § 1395o(2)(A)(ii)."

These proposed definitions are overbroad. Plaintiffs do not challenge their denial of enrollment in the entire "Medicare Program," which contains a similar alien eligibility provision for its hospital insurance plan, 42 U.S.C. § 426a(a)(4) (1970), but only the eligibility requirement for the supplemental medical insurance plan. In addition, the class plaintiffs Diaz and Clara propose to represent would include all aliens from ambassadors to vessel crew members. Such a definition finds no support in the stipulated facts, nor do we think it can comport with the requirement of Fed. R. Civ. P. 23(a)(3) that the claims or defenses of the representative parties be typical of those of the class. We will therefore make appropriate emendations to narrow the definitions of the class and sub-class certified.

[5] Plaintiffs Diaz and Clara, like many other Cuban refugees, were "paroled" into the United States by the Attorney General, and remain here at his discretion. 8 U.S.C. § 1182(d)(5) (1970). As parolees, they were allowed to reside in this country without regard to openings in the numerical limitations for immigrants. 8 U.S.C. §§ 1151, 1101(a)(27); Act of Oct. 3, 1965, Pub. L. No. 89-236, § 21(e), 79 Stat. 911. Although parole of an alien "shall not be regarded as an admission," 8 U.S.C. § 1182(d)(5) (1970), and does not ordinarily place him "legally within the United States," *Ma* v. *Barber*, 357 U.S. 185, 189-90 (1958), we think that the

the United States continuously for five years nor been lawfully admitted for permanent residence within the statutory meaning of that term.[6] Plaintiff Espinosa has

special legislation which authorizes the adjustment of status of Cuban parolees to that of lawful admission for permanent residence implicitly recognizes that their parole contemplates something more in the nature of an entry than a detention. Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161, *in* 8 U.S.C. § 1255 note (1970). *See* note 6 *infra*.

In addition to parole, there is one other significant way for immigrant aliens to avoid the numerical limitations and to gain admission to the United States. A limited number of "conditional entry" permits is available to aliens uprooted from their homeland by designated natural catastrophes and by persecution either in Communist-dominated nations or in countries in the Middle East. 8 U.S.C. § 1153(a)(7) (1970).

[6] The Secretary defers to factual determinations by the Attorney General that an alien seeking enrollment in Medicare comes within the statutory meaning of this phrase, pursuant to Social Security Ruling 68-38 which states, in pertinent part:

> "The phrase 'lawfully admitted for permanent residence', as found in section 103(a)(4) of P. L. 89-97 and section 1836(2)(a) of Title XVIII, is a term of art adopted from the Immigration and Nationality Act, in section 101(a)(29) of which it is defined [8 U.S.C. § 1101(a)(20) (1970)]. Accordingly, the phrase has the same meaning in Title XVIII as it does in the Immigration and Nationality Act. The Administration, in its determinations under sections 103 and 1836 is obliged to accept the determinations of the Attorney General and his delegates as to the fact of lawful admission, since only that official is authorized by statute to make such determinations."

Social Security Administration, 1968 Cum. Bull. 197, *in* 1 Unempl. Ins. Rep. ¶ 15,064 at 2499-289; *cf.* Social Security Administration, Claims Manual, pt. 10, §§ 10108.7-10108.9 (1973).

Under the Immigration and Nationality Act of 1952, *as amended*, 8 U.S.C. §§ 1101 *et seq.* (1970), every applicant for admission to the United States is presumed to be an immigrant seeking lawful admission for permanent residence until he demonstrates that he is entitled to admission as a nonimmigrant. 8 U.S.C. § 1184 (1970); *see* note 8 *infra*. An immigrant who meets the other requirements for admission must await an opening in the numerical limitations before he may be issued an immigrant visa and, upon arrival, acquire permanent residence status. 8 U.S.C. § 1151(a) (1970).

Aliens who arrive in the United States not as immigrants, but as parolees, conditional entrants or nonimmigrants may, in

been lawfully admitted for permanent residence, but has not yet resided in the United States continuously for five years. All have applied for enrollment in the supplemental medical insurance program and been rejected.[7]

Plaintiffs submit, and we find, that each of the prerequisites for maintenance of a class action pursuant to Rules 23(a) and (b)(2) has been met with respect to both the class and sub-class hereinafter defined. The class certified in this action shall consist of:

> All immigrants[8] residing in the United States who have attained the age of 65 and who have been or

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some cases, later obtain adjustment of their status to that of permanent residence. Thus, Cuban parolees like plaintiffs Diaz and Clara become eligible for an adjustment of status after being "physically present in the United States for at least two years." Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161, *in* 8 U.S.C. § 1255 note (1970). Upon making application, the Cuban parolee faces a further delay, which we are informed is now approximately two years, while he awaits an opening in the Western Hemisphere numerical limitation. *Id; see* note 5 *supra*. After acquiring a place in the quota and a determination of admissibility from the Attorney General, he is entitled to permanent residence status retroactive, in most cases, to the date of his admission. *Id.* It is important to note, however, that in practice Cuban parolees cannot ordinarily obtain permanent residence status until they have resided in the United States for four years or more.

Likewise, conditional entrants may obtain permanent residence status retroactive to the date of their entry after residing in the United States for at least two years. 8 U.S.C. § 1153(g) and (h) (1970). With the exception of alien crewmen and natives of countries of the Western Hemisphere, other aliens may obtain adjustments of their status at the discretion of the Attorney General no matter how they first lawfully gained admission into the United States, provided that there is an opening in the numerical limitations. 8 U.S.C. § 1255 (1970). Adjustments may also be made by the Attorney General to avoid hardships in the case of deportable aliens, 8 U.S.C. § 1254 (1970), and aliens who arrived in the United States prior to July 1, 1924. 8 U.S.C. § 1259 (1970).

[7] Plaintiff Espinoza's claim denial notice does not appear of record, but 42 U.S.C. § 1395o(2)(a)(ii) (1970) imposes upon the Secretary a ministerial duty to reject his application, and we proceed upon the assumption that the Secretary did not act improperly.

[8] The word "immigrant" is a term of art employed by the Immigration and Nationality Act of 1952, which is defined as "*every* alien except an alien who is within one of the . . . classes of nonimmigrant aliens." 8 U.S.C. § 1101(a)(15) (1970) (emphasis added). Twelve categories of nonimmigrant aliens are explicitly enumerated by the Act and inculde, for example, diplomatic personnel, short-term visitors for business or pleasure, crewmen, students, braceros and foreign correspondents. *Id.* We use the term in its technical sense, which encompasses conditional entrants, as well as to include those who, like Cuban parolees, may become immigrants through retroactive adjustments of status. *See* note 5 *supra*.

> will be denied enrollment in the supplemental medical insurance program under Medicare, 42 U.S.C. § 1395j *et seq.* (1970), because they are not aliens lawfully admitted for permanent residence who have resided in the United States continuously during the five years immediately preceding the month in which they apply for enrollment as required by 42 U.S.C. § 1395o(2)(A)(ii) (1970).

Pursuant to Rule 23(c)(4), we will also certify a subclass consisting of:

> All immigrants lawfully admitted for permanent residence in the United States who have attained the age of 65 and who have been or will be denied enrollment in the supplemental medical insurance program under Medicare, 42 U.S.C. § 1395j *et seq.* (1970), solely because of their failure to meet the five-year continuous residency requirement of 42 U.S.C. § 1395o(2)(A)(ii) (1970).

Equal Protection Standard

Whether the compelling governmental interest test or the rational basis criterion provides the applicable standard by which the constitutionality of the alien eligibility provision must be assessed presents the threshold question for consideration. Defendant contends that because this case falls within the area of economic and social welfare legislation, it must ipso facto be governed by the rule that the "Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960);

Dandridge v. *Williams*, 397 U.S. 471 (1970); *Richardson* v. *Belcher*, 404 U.S. 78 (1971); *Lindsey* v. *Normet*, 405 U.S. 56 (1972); *Jefferson* v. *Hackney*, 406 U.S. 535 (1972); *United States* v. *Kras*, —— U.S. —— (1973). But the government's reliance on *Nestor* and its progeny is inapposite to the extent that none of those cases involved even a colorable claim of discrimination.

Plaintiffs respond that the deprivation they suffer from denial of eligibility for supplemental medical insurance can only be justified if "necessary to promote a compelling governmental interest," *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969), because the classification they challenge, as one based on alienage, is "inherently suspect," *Graham* v. *Richardson*, 408 U.S. 365, 376 (1971); *Takahashi* v. *Fish & Game Comm'n*, 334 U.S. 410 (1948); *Korematsu* v. *United States*, 323 U.S. 214 (1944); *cf. Weber* v. *Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Hunter* v. *Erickson*, 393 U.S. 385 (1969); *Loving* v. *Virginia*, 388 U.S. 1 (1967), and burdens their access to one of the "necessities of life" in which they assert a "fundamental right." *Roe* v. *Wade*, —— U.S. —— (1973); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Bullock* v. *Carter*, 405 U.S. 134 (1972); *Shapiro* v. *Thompson*, *supra*; *Harper* v. *Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

But plaintiffs' invocation of cases requiring a compelling interest to justify classifications burdening or infringing certain fundamental constitutional rights is not entirely persuasive. Although we cannot denigrate the importance of medical care to the aged, or the possibility that its deprivation may amount to the denial of the constitutional right to life itself, it is far from clear that the denial of such "necessities of life" alone justifies application of the compelling interest standard. *Compare Graham* v. *Richardson*, *supra* at 380 *with Lindsey* v. *Normet*, *supra* at 73-74. Moreover, the very infancy of this, the first Congressional enactment ever to provide medical care benefits, cautions against presuming it to be a "fundamental right," the denial of which necessitates a high level of legislative justification. *Cf. Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). On the contrary, in

the absence of an apparent or presumptive discriminatory purpose or effect, the courts have refrained from applying the compelling interest standard to social benefit legislation. *E.g. Lindsey* v. *Normet*, *supra*; *Jefferson* v. *Hackney*, *supra*; *Richardson* v. *Belcher*, *supra*; *Dandridge* v. *Williams*, *supra*.

Likewise, plaintiffs' reliance on decisions imposing a compelling interest standard on classifications deemed "inherently suspect" proves too much. Such a per se rule is doubtless appropriate where classifications are "based on unalterable traits such as race and lineage." *Lindsey* v. *Normet*, *supra* at 73 (footnotes omitted). But the fact that alienage is a governmentally created status suggests that it may not constitute such a consistently illegitimate distinction as to warrant mechanical application of the compelling interest test.[9] Indeed, the leading case treating alienage as an "inherently suspect" distinction avoided the express use of that test, *Graham* v. *Richardson*, *supra* at 375-76, although some more recent alienage decisions have held Congress to the compelling interest standard. *E.g. Jalil* v. *Hampton*, 460 F.2d 923 (D.C.Cir. 1972); *Faruki* v. *Rogers*, 349 F.Supp. 723 (D.D.C. 1972).

Although we cannot say that Congress may never be held to a lesser constitutional standard than the states, *but see Morris* v. *Richardson*, *supra* at 499, neither can we accept the view that Congress may never be held to the same standard. For example, to differentiate between citizens and aliens in regulating entry into the United States may be a presumptively proper exercise of Congressional power, whereas a like discrimination by legislatures regulating entry into the states would not: different fourteenth and fifth amendment constitutional tests might therefore be appropriate. *Cf. Graham* v. *Richardson*, *supra*; *Shapiro* v. *Thompson*, *supra*.

Inversely, there are occasions when the compelling interest test might just as appropriately be applied to Congressional enactments as to those of state legislatures.

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[9] *See* Note, *Protection of Alien Rights Under the Fourteenth Amendment*, 1971 Duke L.J. 583, 594-97 (1971).

For example, the fact must not be overlooked that aliens are not simply politically disadvantaged, as are members of other "inherently suspect" classifications: they lack the power of the ballot entirely at both the state and federal levels. Moreover, aliens have endured a long history of open discrimination at the hands of the political process. *See, e.g. Oyama* v. *California*, 332 U.S. 633, 651 n.1 (1948) (Murphy, J. concurring). Because the political system provides no check on such discrimination, there may well be instances when application of a compelling interest standard is warranted in review of state and federal enactments to protect aliens from discrimination resulting from their lack of political representation.

If it is a close question whether the compelling interest standard should be applied to a classification based on alienage under the circumstances here, we think similar considerations permit the conclusion that, whatever the standard, the protection of fifth amendment due process is available to remedy such claims of discrimination against aliens as appear in this case. It is settled, at least, that aliens lawfully residing in the United States are "persons" within the meaning of both the fourteenth and fifth amendments, and are entitled to their protection. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 586 n.9 (1952); *Truax* v. *Raich*, 239 U.S. 33 (1915).

Moreover, even though fourteenth amendment notions of equal protection are not entirely congruent with fifth amendment concepts of due process, it is nonetheless accepted that "discrimination may be so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). The danger of unjustifiable discrimination against aliens is nowhere greater than in the enactment of social benefit programs like Medicare, where their complete lack of representation in the political process may result in the purposeful or inadvertent exclusion of aliens from benefits. It is in this sense that "[a]liens as a class are a prime example of a discrete and insular minority." *Graham* v. *Richardson*, *supra* at 372. We therefore conclude that the fifth amendment can here be said to contain the same "pledge of the protection of equal laws," *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886), as is evident from the fourteenth amendment. *Cf. Richardson* v. *Belcher*, *supra* at 81.

A statutory classification accords with fundamental equal protection and due process notions only if, as recent decisions employing the rational basis test have acknowledged, it is both "rationally based *and free from invidious discrimination.*" *Dandridge* v. *Williams*, *supra* at 487, *quoted in Richardson* v. *Belcher*, *supra* at 81 (emphasis added); *cf. Jefferson* v. *Hackney*, *supra* at 547. Invidious discrimination may appear in either an impermissible statutory purpose, *see Gomillion* v. *Lightfoot*, 364 U.S. 339, 341 (1960); *Yick Wo* v. *Hopkins*, *supra*, or in the choice of a classification that is impermissibly discriminatory as applied to achieve a valid legislative purpose. *Cf. Hirabayashi* v. *United States*, 320 U.S. 81 (1949); *Korematsu* v. *United States*, *supra*. Because alienage is a classification "inherently suspect and . . . therefore subject to strict judicial scrutiny," *Graham* v. *Richardson*, *supra* at 376, we think the rational basis standard requires no less than such a twofold analysis of the provisions challenged here.[10] Whether the compelling interest standard should be applied instead need not be decided in view of our holding, for the reasons which follow, that the alien eligibility provision cannot meet even the requirements of the rational basis test.

ARGUMENT

Plaintiff contends that the entirety of the alien eligibility provision for supplemental medical benefits violates due process. For the sake of convenience, we turn our attention first to the five-year continuous residency aspect of 42 U.S.C. § 13959(2)(A)(ii) (1970). Defendant has advanced two legislative purposes which he asserts are valid of themselves and bear a rational relationship to this durational residency condition: (1) that the residency requirement is essential to the continuing fiscal

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[10] *See Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1077-87 (1969).

integrity of the supplemental benefits program; and (2) that it is necessary to prevent certain aliens, such as short-term visitors, from obtaining benefits.

A. *Fiscal Integrity*

We do not doubt that a desire to insure the continued fiscal integrity of the supplemental benefits program is itself a valid governmental purpose. *Cf. Shapiro* v. *Thompson, supra* at 633. But the facts do not support defendant's conclusion that the residency requirement either was intended to serve, or does serve, that objective.

If, in fact, Congress intended to protect the fiscal integrity of the program by attaching a residency requirement for alien eligibility, the legislative history of the provision is singularly casual about such a concern. The House-passed bill contained no durational residency requirement at all for alien participation in the supplemental benefits program. H. Rep. No. 682, 89th Cong., 1st Sess. 39 (1965), *in* 111 Cong. Rec. 18371 (1965); U.S. Code Cong. & Ad. News 2233-34 (1965). Although the Senate version added a 10-year residency provision, 111 Cong. Rec. 15609, 15613 (1965), a conference committee compromise reduced it to the present five-year term. H. Rep. No. 682, *supra* at 39-40. It is therefore difficult to conclude that Congress considered the durational residency requirement for aliens an element particularly important to the fiscal integrity of the supplemental medical insurance program.

The government nonetheless argues that the alien residency requirement is necessary to permit the supplemental benefits program to become increasingly self-supporting. Whereas this purpose may be apparent in the hospital insurance program created by Medicare, 42 U.S.C. § 426a (1970); S. Rep. No. 404, 89th Cong., 1st Sess. 66-70 (1965), *in* U.S. Code Cong. & Ad. News 2007-11 (1965), it is not true of Medicare's supplemental medical insurance program.

The Federal Supplementary Medical Insurance Trust Fund created by the 1965 Medicare Amendments derives one-half of its income at all times from appropriations of the general revenues of the United States. 42

U.S.C. § 1395w (1970). The remaining half is supplied by monthly premium payments from eligible individuals who choose to enroll in the program. 42 U.S.C. § 1395r(b)(2) (1970). Moreover, unlike the hospital insurance system, the supplemental benefits program was intended by Congress to run on a "current cost" financing basis, and to be equally funded by general revenue contributions and adjustable premiums. S. Rep. No. 404, *supra*. Thus, the only discernible means by which the trust fund might become increasingly self-supporting is through adequate appreciation of its investments to permit decreases not only in premium payments but also in general revenue contributions. We can therefore find no evidence that the alien residency requirement is either necessary or rationally related to the asserted purpose of maintaining, much less improving, the fiscal position of the supplemental medical insurance program.

Nor can defendant argue that Congress may validly exclude retirement-age aliens from participation in the supplemental benefits program simply because their inclusion would require additional federal revenue contributions to the trust fund. Regardless of whether they have ever in their lives paid federal taxes, retired indigent citizens who receive state public assistance benefits are eligible for the supplemental medical insurance program, *see* 42 U.S.C. § 1395s(f) and (i) (1970), and the general revenues provide half the cost of their benefits. Moreover, federal tax revenues are still further depleted on behalf of retired indigent citizens to the extent that the supplemental program's monthly premiums due from them may be paid by state public assistance programs, 42 U.S.C. § 1305v(d)(1) (1970), which are funded in substantial part by the federal government. 42 U.S.C. § 1396b(a)(1) (1970). But the five-year residency requirement operates to exclude retirement-age aliens, whether indigent or not, from these same benefits, despite the fact that those among them who are indigent may not be barred from state public assistance programs on the basis of durational state residency requirements. *Machado* v. *Department of Health & Rehab. Serv.*, —— F.Supp. —— (S.D.Fla. 1973) (three-judge court); *Zarate*

v. *Department of Health & Rehab. Serv.*, 347 F.Supp. 1004 (S.D. Fla. 1971) (three-judge court); *cf. Graham* v. *Richardson*, *supra*; 42 U.S.C. § 1396a(a)(10)(II) (1970).

If it was the Congressional purpose to preserve the general federal revenues from depletion by excluding aliens alone through the residency requirement, that classification results in a discrimination which can only be termed invidious. The general revenues used to pay supplemental benefits to retired indigent citizens come from taxes imposed on all non-indigents in the United States, and it must not be forgotten that "[a]liens, like citizens pay taxes." *Graham* v. *Richardson*, *supra* at 376. Federal taxes paid by aliens therefore underwrite the very supplemental benefits for retired indigent citizens which Congress has made unavailable to members of plaintiffs' class. To the extent that aliens, but not citizens, are deprived of supplemental benefits by the durational residency requirement, the classification discriminates invidiously against them.[11] If Congress may choose to underwrite a major part of the medical expenses of retired indigent citizens with funds from the public treasury, it may not constitutionally do so on the basis of a classification which works an exclusion from benefits of similarly situated aliens. *Shapiro* v. *Thompson*, *supra* at 633 & n.11.

In addition, we must question the basic rationality of attempting to achieve cost economies in the supplemental

[11] As of November 1972, Cuban Refugee Center statistics showed that 446,387 Cuban refugees had arrived in the United States since January 1961. Cuban Refugee Program, Weekly Statistical Report, pt. A (Nov. 17, 1972), Plaintiffs' Memorandum for Summary Judgment, Exhibit A. Of these, 159,643 arrived between February 2, 1968, and October 30, 1972, during which period 12,730 or 8 percent were age 65 or over upon arrival. *Compare* Cuban Refugee Program, Consolidated Report of Overall Operation (Oct. 1972), Plaintiffs' Memorandum for Summary Judgment, Exhibit C2, *with* Cuban Refugee Program, Consolidated Report of Overall Operation (Jan. 1968), Plaintiffs' Memorandum for Summary Judgment, Exhibit B2. Although this sample is inadequate as a basis for more detailed projections, it does not appear that the number of Cuban refugees whose age would otherwise qualify them for supplemental medical insurance benefits is disproportionately large in comparison with the number of potential new taxpayers.

medical benefits program by means of a residency requirement having the necessary effect that this one now has on members of plaintiffs' class. Because it simply serves to postpone their eligibility for supplemental medical benefits, we think it not improbable that those who desire and need such benefits will defer, insofar as humanly possible, all covered medical expenses until such time as they meet the eligibility requirements. The net result can only be higher benefits claims for each such individual when he becomes eligible, given a five-year period of minimal medical care with its attendant frustration of the economies of preventive medicine. Thus, the residency requirement appears more likely to increase, rather than decrease, the costs of the supplemental medical insurance program, unless the rather morbid presumption is indulged that mortality among members of the class prior to the time that they become eligible will more than offset such increases.

B. *Undeserving Aliens*

The government suggests, secondly, that Congress may validly seek to exclude entirely certain aliens from receiving supplemental medical insurance benefits. Specifically, defendant asserts that Congress may rationally bar from the program aliens visiting or residing in the United States temporarily, aliens who enter solely to obtain medical treatment, and aliens who are residing illegally in the United States. We assume, without deciding, that such a purpose is a proper one. *But see Shapiro* v. *Thompson*, *supra* at 631.

We think the alien residency requirement constitutes an overly inclusive classification to accomplish any of these purposes. Although a five-year period may be long enough effectively to exclude most short-term alien visitors or residents, it will not exclude those maintaining their domicile abroad but who, like ambassadors, foreign correspondents and other professionals, may be required by their occupation to reside in the United States for longer periods of time. Even aliens entering the country for medical treatment will not necessarily be excluded by the alien residency requirement if the treatment they seek

demands such prolonged care and observation as may be necessary for cancer and other major diseases. Likewise, if the five-year residency test contributes at all to the apprehension and exclusion from benefits of aliens residing here illegally, a shorter residency period should perform the same functions even better. The durational residency provision "enact[s] what in effect are non-rebuttable presumptions that every [alien] applicant for assistance" came to the United States for a disqualifying purpose. *Shapiro* v. *Thompson*, *supra* at 631. To utilize the alien residency requirement to serve these purposes is therefore to use a particularly blunt instrument for a surgical task.

In evaluating the impact of this implement on plaintiffs' class, we cannot ignore the fact that its design was, as we have noted, the product of compromise. Perhaps the only consistent result of that compromise is to exclude immigrant aliens from supplemental medical benefits until such time as they are eligible for citizenship and, as citizens, for benefits.[12] The fact that the compromise residency requirement corresponds to the waiting term for naturalization cuts against, not in favor of its constitutionality as a tool for barring a limited number of aliens from benefits. If some aliens may legitimately be excluded from the supplemental medical benefits program, as we have assumed, the use of a classification so overbroad that it excludes almost all aliens *qua* aliens is invidiously discriminatory, if it is not arbitrary and without rational basis. *Cf Hirabayashi* vs. *United States*, *supra*; *Korematsu* v. *United States*, *supra*.

[12] Five years of continuous residence are also required for eligibility for naturalization. 8 U.S.C. § 1427(a)(1) (1970); *see* note 21 *infra*. Naturalized citizens are, of course, eligible for supplemental medical insurance benefits upon the sole condition that they attain the age of 65. 42 U.S.C. § 1395o(1) and (2)(A)(i) (1970). Although naturalization requires permanent residence status in conjunction with five years of residence, adjustments of status retroactive to the date of arrival can be obtained by plaintiffs and members of the class they represent, a process which takes less than five years in the case of Cuban parolees. *See* note 6 *supra*.

C. *Other Justifications*

Shapiro v. *Thompson* suggests other possible legislative purposes which might justify the alien residency requirement, although defendant has not urged them upon us. They merit consideration because the courts, in applying the rational basis standard, have attributed to the legislature any reasonably conceivable purpose which would support the constitutionality of the classification.[13] It could be argued here, as it was in *Shapiro*, that the residency requirement "(1) facilitates the planning of the welfare budget; (2) provides an objective test of residency; (3) minimizes the opportunity for recipients fraudulently to receive payments from more than one jurisdiction; and (4) encourages the early entry of new residents into the labor force." 394 U.S. at 643.

The fact that no residency requirement for eligibility is placed on citizens belies any attempt to justify it as essential for planning either general revenue or trust fund budgets, especially since long-term projections are unnecessary given the program's funding on a "current cost" basis. Nor can the five-year delay in eligibility be rationalized as an objective test of residency in light of the provision's twin requirement of permanent residence status which, however it may constitutionally be defined, provides just such a test. Lastly, it suffices to note that the possibility of fraudulent receipt of benefits from more than one jurisdiction is here inoperative, as is any legislative purpose to encourage the entry of retirement-age aliens into the labor force. For these reasons we must conclude that the classification created by application of the residency requirement to aliens, but not to citizens, is invidiously discriminatory as a means to accomplish these arguably valid legislative purposes.

Defendant has advanced no other theory to justify the durational residency requirement, and we can conceive of none. We therefore decide that the five-year residency requirement for alien eligibility for supplemental medical insurance benefits violates equal protection notions in-

[13] *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1078 (1969).

herent in fifth amendment due process. To grant relief to plaintiff Espinoza and the sub-class of those with permanent residence status which he represents, we need continue no further.

SEPARABILITY

Yet plaintiffs Diaz and Clara urge on behalf of the class herein certified that we proceed to examine the constitutionality of the requirement of permanent residence status. We have no occasion to consider this second aspect of the alien eligibility provision, however, because its permanent residence language cannot, in our view, be severed from the durational residency requirement.[14]

The very wording of the twin residency requirements suggests that Congress may not have intended that they be separable.[15] Moreover, the legislative history of the alien eligibility provision for supplemental medical insurance is devoid of evidence of Congressional intent to treat its twin requirements as severable ones.[16] Nor is

[14] Although for this reason we need not consider *Asensio* v. *Richardson, Civil* No. 71-1446, [1972 Transfer Binder] CCH Medicare & Medicaid Guide ¶ 26,475, at 10,242-44 (S.D. Fla. May 2, 1972), we note that our decision here is not inconsistent with that case because the ruling there concerned a deported nonimmigrant who had no reasonable expectation of remaining in the United States for other than a "temporary period of time." *Id.* at 10,244; *see* note 5 *supra*.

[15] If the phrases were linked by a conjunction such as "and" or "or," rather than by the relative pronoun "who," we would be less hesitant than we are to conclude that Congress intended them to be separable.

[16] Although Section 1836 of H.R. 6675 contained no durational residency requirement when initially considered and passed by the House on April 8, 1965, 111 Cong. Rec. 7444 (1965), such a provision was an integral part of the bill which received Senate approval. However, no clear manifestation of Congressional intent about separability is evident in the report of the Senate Finance Committee where, in closed session, the alien eligibility language of H.R. 6675 attained its present form. S. Rep. No. 404, 89th Cong., 1st Sess., pt. 2 at 483 (1965), *in* Senate Reports, Miscellaneous Reports on Public Bills III (GPO 1965). Although the alien eligibility provision is once paraphrased disjunctively in the explanatory section of the Senate report, S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1 at 70 (1965), *in* U.S. Code Cong. & Ad. News 2011 (1965), that document elsewhere consistently traces the exact language of the amended provision. S.Rep. No. 404, pt. 1, *supra* at 39, 170, *in* U.S. Code Cong. & Ad. News, *supra* at 1980, 2109. No instructive discussion of severability occurred on the Senate floor because the eligibility provision was submitted as one of several technical amendments at the start of debate, 111 Cong. Rec. 15613 (1965), and was accepted without separate consideration. 111 Cong. Rec. 15609 (1965).

guidance provided by the history of any other provision of the 1965 Amendments.[17] If similar requirements in subsequent laws are not uninstructive,[18] no prior social

[17] Although Section 103(a)(4) of H.R. 6675 contained, in its final form, an identical alien eligibility provision for the Medicare hospital insurance plan, its legislative history is no more illuminating on the separability question. As it initially passed the House, that provision contained a 10-year residency requirement, but no permanent residence component. H.Rep. No. 682, 89th Cong., 1st Sess. 39 (1965), *in* 111 Cong. Rec. 18371 (1965); U.S. Code Cong. & Ad. News 2233 (1965). The permanent residence language first appeared after amendment of H.R. 6675 by the Senate Finance Committee in closed session. S.Rep. No. 404, 89th Cong., 1st Sess., pt. 1 at 194 (1965), *in* U.S. Code Cong. & Ad. News 2134 (1965). Despite a paraphrase in disjunctive form in the Senate report, S.Rep. No. 404, pt. 1, *supra* at 25, *in* U.S. Code Cong. & Ad. News, *supra* at 1961, the explanatory material more often follows the exact language of the amended provision. S.Rep. No. 404, pt. 1, *supra* at 69, 194, *in* U.S. Code Cong. & Ad. News, *supra* at 2007, 2134 (1965).

[18] *See* 42 U.S.C. § 1382c(a)(1)(B)(ii) (Supp. II, 1973); 42 U.S.C. § 428(a)(3)(B) (1970). We think it significant that the most recent expression of the will of Congress on eligibility for social benefits makes special provision for parolees and conditional entrants to insure their inclusion as individuals eligible for aid to the aged, blind and disabled. This eligibility test abandons the durational residency requirement for aliens, and its permanent residence provision contains a new exception. Benefits are made available to an otherwise qualified individual who is:

> "either (i) a citizen or (ii) an alien lawfully admitted for permanent residence or otherwise *permanently residing in the United States under color of law* (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) [conditional entry] or section 212(d)(5) [parole] of the Immigration and Nationality Act).

42 U.S.C. § 1382c(a)(1)(B) (Supp. II, 1973) (emphasis added).

benefit legislation contains such a provision.[19] And even though administrative practice may sometimes be persuasive evidence of legislative intent, *e.g. Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), it is of little assistance here.[20]

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[19] A key word computer search of all but Title 8 of the 1970 edition of the *United States Code* which focused on the terms "alien" and "eligible" and varients thereon failed to reveal the existence of any pre-1965 legislative provision then in force that links permanent residence and durational residency elements. *But cf.* 8 U.S.C. § 1427(a) (1970). The court acknowledges with appreciation the help in resolving this question provided by the Office of Computer Services in the Administrative Division of the Department of Justice, and of JURIS, the Justice Retrieval and Inquiry System.

[20] The Social Security Administration, charged with implementing the Medicare programs, has issued an interpretation of the alien eligibility requirement which leaves the separability issue in doubt:

> "An individual who is age 65 or over is eligible for enrollment in the supplementary medical insurance plan . . . if:
>
> * * *
>
> "(c) He is an alien lawfully admitted for permanent residence, *who* is a resident of the United States *and who* has resided in the United States continuously during the 5 years immediately preceding the month in which he applies for enrollment."

20 C.F.R. § 405.206 (Supp. 1972). It may be that in practice some applications for enrollment are rejected solely for failure to meet one part of the residency requirement or the other, *see* note 6 *supra*, as were those of plaintiffs Diaz and Clara for inadequate length of residence. Their rejection notices, which followed what appears to be a standard format, stated:

> "*You* are not entitled to health insurance protection under the Social Security Act because you are not a United States citizen and have not resided in the U.S. for a required period of time. *A person* not entitled to social security benefit or railroad retirement annuity must be a citizen or must have been admitted to the United States for permanent residence and have actually resided in the U.S. for 5 years immediately before the month he filed for health insurance." (Emphasis added.)

We think such evidence of administrative interpretation too inconclusive to be entitled to great deference.

The most reliable indication of Congressional intent appears in the report of the House delegation to the conference committee, which reveals that unification of the two residency elements was an integral part of the larger compromise necessary to the final passage of the 1965 Medicare Amendments.[21] Although we recognize

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[21] The legislative history of the alien eligibility provision as finally enacted demonstrates that it was a product of compromise. Neither House simply "receded" before the wishes of the other. The report submitted to the House on H.R. 6675 by that Chamber's conferees indicates that the differences between the two Houses over the alien eligibility provision in Sction 1836 of the bill for the part B supplemental medical insurance plan were not considered in isolation, but jointly with like disagreements over the eligibility provision for the part A hospital insurance plan in Section 103 (a)(4). H.Rep. No. 682, 89th Cong., 1st Sess. 39-40 (1965), *in* 111 Cong. Rec. 18371 (1965); U.S. Code Cong. & Ad. News 2233-34 (1965). The house bill initially contained only a requirement of permanent residence status for part B, and only a 10-year residency provision for Part A. The Senate incorporated a 10-year residency provision into part B, and a requirement of permanent residence status into part A, while shortening the original 10-year residency provision of part A to six months. The conference committee compromise package integrated the permanent residence requirement with a five-year residency provision, and imposed the resulting unified eligibility requirement on both the part A hospital insurance and part B supplemental medical insurance plans.

It may well be, as the government suggests, that the terms of the compromise were adapted from the residence requirement for naturalization contained in Section 316(a) of the Immigration and Nationality Act of 1952, which provides in pertinent part:

> "No person . . . shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totalling at least half of that time . . . ."

8 U.S.C. § 1427(a) (1970). Yet if this not unlikely hypothesis could be confirmed, the fact that the twin elements of the supplemental insurance plan's eligibility provision were both borrowed from the naturalization statute would, of itself, provide weighty evidence that Congress did not intend them to be separable. Perhaps more persuasive evidence for the same conclusion is provided by the difficulties that would be inherent in rescuing the permanent residence language of § 316(a) if its five-year residency provision

that reasonable men might differ on this question, we think the closely interwoven compromise language of the eligibility requirement's twin residency aspects rebuts any lingering presumption of separability from the general savings clause of the Social Security Act,[22] and that the entire provision must stand or fall as an entity.[23]

CONCLUSION

On the basis of the foregoing findings of fact and conclusions of law, we hold the entirety of the alien eligibility requirement of 42 U.S.C. § 1395o(2)(A)(ii) (1970) unconstitutional as a denial of fifth amendment due process. We therefore permanently enjoin the de-

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were stricken. But whatever the case, pragmatic compromise or adaptation, the evidence points to the conclusion that Congress intended no separability of the twin requirements of the alien eligibility provision.

[22] Section 1103 of the Social Security Act of 1935 provides:

> "If any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby."

42 U.S.C. § 1303 (1970).

[23] The touchstone of separability is, of course, Congressional intent. For this reason, the Supreme Court recently observed:

> "[W]hatever relevance such an explicit [severability] clause might have in creating a presumption of severability, the ultimate determination of severability will rarely turn on the presence or absence of such a clause."

United States v. Jackson, 390 U.S. 570, 585 n.27 (1968) (citations omitted). We have serious doubts, for the reasons stated, that Congress would have enacted the permanent residence language by itself, and we are not without reservations about the constitutionality of that aspect of the residency requirement. Particularly in view of the possibility that Congress adapted the alien eligibility provision from the prerequisits for naturalization, *see* note 21 *supra*, we think it evident that the twin requiremnets are not sufficiently independent that "the valid part may be dropped [because] what is left is fully operative as a law." *Id.* at 585, *quoting* Champlin Rfg. Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932).

fendant Secretary from this day forward from relying on that provision to deny enrollment in the Medicare supplemental insurance plan, 42 U.S.C. § 1395j *et seq.* (1970), not only to plaintiff Espinoza and the sub-class he represents, but also to plaintiffs Diaz and Clara and the class herein certified.

The fact that it was unnecessary to reach the issue posed by the permanent residence requirement does not mean that we entertain no doubts about its constitutionality. Although the phrase may appear on its face to be a legitimate extension of the Congressional power to regulate entry into the United States, in actuality it may simply duplicate the immigration laws which screen out potential immigrants likely to become public charges.[24] Moreover, if its efficacy as a deterrent is subject to question, so too is the rationality of its scope as a means to achieve the legislative purposes the government has here advanced in defense of the entire alien eligibility provision.

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[24] For a brief summary of the provisions of the Immigration and Nationality Act which operate to exclude and remove immigrant aliens likely to become, or who do become, public charges, see Graham v. Richardson, 403 U.S. 365, 377 (1971). These provisions apply not only to immigrants, but also to nonimmigrants, unless waived by the Attorney General. 8 U.S.C. §§ 1182(a), 1184(a) (1970); 8 C.F.R. § 214.1(a) (Supp. 1973). Although parolees and conditional entrants may arrive in the United States without first meeting these self-support admission standards, 8 U.S.C. §§ 1153(a)(7), 1182(d)(5) (1970); 8 C.F.R. § 212.5(a) (Supp. 1973), parole is subject to revocation at any time at the Attorney General's discretion. Parolees who seek adjustments of status to that of permanent residence either to obtain greater security or to become eligible for naturalization must meet the standard admission requirements, including those of financial self-support. Act of Nov. 2, 1966, Pub. L. No. 89-732, § 1, 80 Stat. 1161, *in* 8 U.S.C. § 1255 note (1970); 8 U.S.C. §§ 1182(a), 1255(a) (1970). It is mandatory that conditional entrants who have not acquired permanent residence status after residing in the United States for two years be examined to determine whether they meet the financial requirements for admission or must be deported. 8 U.S.C. § 1153(g) (1970). Likewise, nonimmigrants who seek adjustments of status to that of permanent residence must meet the prerequisites for admission, incuding those of self-support. 8 U.S.C. § 1255(a) (1970).

Neither can we ignore the fact that to uphold the requirement of permanent residence status would be to work a fundamental injustice in that a major part of the relief contemplated by this decision would thereby be rendered a nullity. Plaintiffs Diaz and Clara and the not insubstantial class they represent would be barred from eligibility for supplemental medical benefits for all but about a year prior to becoming eligible for benefits as citizens.[25]

America once held her arms open wide, beckoning other lands to "[g]ive me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shores . . . ." [26] Although it may be, as some cynics have remarked, that that is exactly what she got, to the extent this nation continues to hold out a promise of refuge to victims of political and natural misfortune, the Constitution requires that we accept them to reside here on an equal basis with citizens.

DONE and ORDERED in chambers at the United States Courthouse in Miami, Florida, this 11th day of June, 1973.

/s/ James Lawrence King
JAMES LAWRENCE KING
United States District Judge

[25] *See* notes 6 & 21 *supra*.

[26] E. Lazarus, "The New Colossus" (1883).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Title Omitted]

ORDER GRANTING MOTION FOR STAY
[Filed June 21, 1973]

A Motion for Stay having come before this Court on the petition of the defendant, United States of America, and the Court having reviewed its file and being fully informed in the premises, it is hereby

ORDERED AND ADJUDGED that the defendant's Motion for Stay is hereby granted for a period of fifty (50) days.

DONE AND ORDERED in Chambers in Miami, Florida, this 21 day of June, 1973.

/s/ Joe Eaton
United States District Judge
[For James Lawrence King,
District Judge]

cc: U. S. Attorney (Ray)
Alfred Feinberg, Esq., Legal Services
of Greater Miami, Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Title Omitted]

ORDER VACATING STAY AND ENTERING FINAL JUDGMENT

This action came on before the court upon plaintiffs' motion to vacate the stay entered by the court on June 21, 1973, and upon defendant's motion for entry of final judgment. The court, having considered the motions, having reviewed the record, and being fully advised in the premises, finds and concludes that both motions should be granted.

By memorandum opinion issued June 11, 1973, the court granted plaintiffs' motion for summary judgment and its request for declaratory and injunctive relief. On the ninth day thereafter defendant filed a motion for stay of the interlocutory ruling. The motion represented, contrary to the provisions of Fed. R. Civ. P. 62(a) that the court's ruling had automatically been stayed for 10 days. It requested an additional 50-day stay for the duration of a 60-day period claimed by defendant in which to file its appeal, the provisions of 28 U.S.C. § 2101(a) notwithstanding. In the absence of the judge given primary responsibility for this case by the three-judge panel, the stay order presented for signature by defendant was signed by another panel member in chambers to prevent prejudice to the government, given the apparent emergency nature of what was represented to be a last-minute motion. But because the requirements of Fed. R. Civ. P. 62(c) had been overlooked by defendant when it drafted an order for signature in chambers by a single judge, the stay is invalid and plaintiff's motion must be granted.

Nonetheless, defendant has had almost two months in the interim to determine whether to appeal the court's ruling. We concur in the judgment that a short stay during which the government might determine whether to appeal and make preparations to comply with our ruling was appropriate in view of the impact of our decision, and would have approved a proper order for this purpose at the proper time. We cannot ignore, however, the daily

detriment suffered by plaintiffs and members of the class and sub-class certified by virtue of their exclusion from enrollment in the supplemental medical insurance program under part B of Medicare. Believing that our decision was right, we conclude on balance that no further stays of our ruling would be appropriate in the absence of any stronger showing of irreparable harm to defendant than has been made. Moreover, we note that in moving for entry of final judgment defendant has requested no further stay, despite the fact that a final order will take effect immediately pursuant to Fed. R. Civ. P. 62(a). An appropriate period having passed during which defendant could prepare to comply with our ruling (and did so prepare, according to defendant's memorandum in support of its motion for stay), we will grant the government's motion for entry of final judgment at this time. Therefore it is,

ORDERED and ADJUDGED that plaintiffs' motion to vacate the stay entered by the court on June 21, 1973, be and the same is hereby granted; it is further

ORDERED and ADJUDGED that the stay entered by the court on June 21, 1973, be and the same is hereby vacated; it is further

ORDERED and ADJUDGED that defendant's motion for entry of final judgment be and the same is hereby granted.

DONE and ORDERED in chambers at the United States Courthouse, Miami, Dade County, Florida, this 7th day of August, 1973.

/s/ David W. Dyer
DAVID W. DYER
United States Circuit Judge

/s/ Joe Eaton
JOE EATON
United States District Judge

/s/ James Lawrence King
JAMES LAWRENCE KING
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Title Omitted]

FINAL JUDGMENT
[Filed August 7, 1973]

This action having come before the court on opposing motions for summary judgment, and the court having heard oral argument, considered the entirety of the record, and being fully advised in the premises, it is,

ORDERED that plaintiffs' motion for summary judgment and their prayer for final declaratory and injunctive relief on behalf of themselves and the class and subclass certified is hereby granted and defendant's motion for summary judgment is hereby denied in accordance with the court's memorandum opinion of June 11, 1973, and for the reasons set forth therein.

DONE and ORDERED in chambers at the United States District Courthouse, Miami, Dade County, Florida, this —— day of August, 1973.

/s/ David W. Dyer
DAVID W. DYER
United States Circuit Judge

/s/ Joe Eaton
JOE EATON
United States District Judge

/s/ James Lawrence King
JAMES LAWRENCE KING
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Title Omitted]

ORDER DENYING STAY PENDING APPEAL
[Filed August 21, 1973]

This action came on before the court upon defendant's motion for issuance of a stay pending appeal. The court, having considered the motion, the emendation to it, the response and the record herein, finds and concludes that the motion should be denied. By order of August 7, 1973, this court observed that "no further stays of our ruling would be appropriate in the absence of any stronger showing of irreparable harm to defendant than has been made." Rather than seeking to present a more detailed showing of the scope and extent of the harm which defendant has or expects to suffer, defendant's present motion simply reiterates the assumption that "this court's decision will severely disrupt the government's administration of the medicare supplementary insurance program." Essentially the same assertion had been advanced by the government in its initial motion for stay filed June 20, 1973.

Neither at that time nor in its most recent motion has the defendant moved for a hearing at which it might argue or develop evidence of the "severe disruption" which it contends implementation or our ruling will entail, despite the requirement of Local Rule 10(B) that a hearing, if desired, be requested. Nor have either of defendant's motions themselves detailed the irreparable harm asserted. Our decision was purposefully a rather narrow one, which carefully read should not have the "far reaching effects" about which defendant has expressed alarm but has not detailed. For these reasons, and the reasons set forth in our order of August 7, 1973, we continue to believe that on balance no further stays of our ruling are appropriate. Therefore it is,

ORDERED and ADJUDGED that defendant's motion for stay pending appeal to the United States Supreme Court be and the same is hereby denied.

DONE and ORDERED in chambers at the United States District Courthouse, Miami, Dade County, Florida, this 17th day of August, 1973.

/s/ David W. Dyer
DAVID W. DYER
United States Circuit Judge

/s/ Joe Eaton
JOE EATON
United States District Judge

/s/ James Lawrence King
JAMES LAWRENCE KING
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 72-1312-Civ-JLK

SANTIAGO DIAZ, JOSE A. CLARA, and VICTOR CARLOS ESPINOSA, PLAINTIFFS

vs.

CASPAR W. WEINBERGER, as Secretary of the Department of Health, Education and Welfare of the United States, DEFENDANT

NOTICE OF APPEAL

NOTICE is hereby given that Defendant, UNITED STATES OF AMERICA, appeals to the United States Supreme Court from the Final Judgment and from the Order dated August 7, 1973, entered by the Honorable David W. Dyer, United States Circuit Judge, the Honorable Joe Eaton, United States District Judge, and the Honorable James Lawrence King, United States District Judge.

ROBERT W. RUST
United States Attorney

By: /s/ Mervyn L. Ames
MERVYN L. AMES
Assistant U.S. Attorney
300 Ainsley Bldg.
Miami, Florida 33132
Tele: 305-350-4471

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true copy of the foregoing Notice of Appeal was this 5th day of September, 1973, mailed to Alfred Feinberg, Esq., Legal Services of Greater Miami, Inc., 395 Northwest 1st Street, Suite 202, Miami, Florida.

/s/ Mervyn L. Ames
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SUPREME COURT OF THE UNITED STATES

No. 73-1046

CASPAR W. WEINBERGER, Secretary of the Department of Health, Education and Welfare, APPELLANT

v.

SANTIAGO DIAZ, et al.

APPEAL from the United States District Court for the Southern District of Florida.

The statement of jurisdiction having been submitted in this case and considered by the Court, probable jurisdiction is noted.

May 13, 1974

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 580-99 278

Appellees, by and through their undersigned counsel, respectfully move this Honorable Court to enter an Order allowing, with avail of Appellees' Waiver of the Right to File Motion to Dismiss or Affirm (filed on or about October 21, 1974) their further response to Jurisdictional Statement of the State Department of Health, Education and Welfare, et al., v. Wilson, et al., (D.C.D.C. 1973), and in support thereof state:

On February 26, 1974 this Court issued its decision in Memorial Hospital, et al. v. Maricopa County, et al., (U.S. 42 U.S.L.W. 4277). The Court there held that a durational residency requirement violated the Equal Protection Clause in that it created an "invidious classification" that impinges on the right of interstate travel by denying newcomers the "basic necessities of life," to wit; free medical care for indigents. Since it cannot reasonably be argued that medical care is any the less a basic necessity of life for aliens than it is for citizens, a classification which denies aliens Medicare benefits as does that portion of the Social Security Act struck down by the District Court in the instant case while at the same time authorizing Medicare benefits for citizens (and long term resident aliens), is clearly an invidious discrimination which must fall under the weight of the Fifth Amendment Due Process Clause. Bolling v. Sharpe, 347 U.S. 497 (1954).

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Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing was served by United States Mail upon Mr. ROBERT H. BORK, Solicitor General of the United States, Mr. IRVING JAFFE, Acting Assistant Attorney General of the United States, Mr. EDMUND W. KITCH, Assistant to the Solicitor General of the United States, and Mr. STEPHEN F. WILDERIN, Attorney, at the United States Department of Justice, Washington, D.C., and Mr. ROBERT W. RUST, United States Attorney, 300 Ainsley Building, Miami, Florida, this 9 day of April, 1974.

ALFRED FEINBERG
Attorney for Appellees

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Supreme Court, U. S.
FILED
AUG 30 1974
MICHAEL RODAK, JR., CLERK

No. 73-1046

In the Supreme Court of the United States

OCTOBER TERM, 1974

CASPER W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

SANTIAGO DIAZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE APPELLANT

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1046

CASPER W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

SANTIAGO DIAZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the district court (J.S. App. 13–40)[1] is reported at 361 F. Supp. 1.

[1] "J.S. App." refers to the appendix to the jurisdictional statement. "A." refers to the appendix to the briefs. The opinion is also reprinted in that appendix (A. 45–68), but without reflection of certain corrections made by the court (see J.S. App. 41–43). Those corrections have been incorporated in the opinion as officially reported.

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JURISDICTION

The judgment of the district court was entered on August 7, 1973 (A. 72). A notice of appeal to this Court was filed on September 5, 1973 (A. 75), and probable jurisdiction was noted on May 13, 1974 (A. 77). The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

QUESTIONS PRESENTED

1. Whether the federal statutory requirement that an alien shall have "resided in the United States continuously" for five years in order to be eligible for the supplementary medical insurance program, 42 U.S.C. (Supp. II) 1395*o*(2)(B),[2] is consistent with the Fifth Amendment.

2. Whether the federal statutory requirement that an alien be "lawfully admitted for permanent residence" in order to be eligible for that program, 42 U.S.C. (Supp. II) 1395*o*(2)(B), is severable from the durational residence requirement and consistent with the Fifth Amendment.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment of the Constitution provides in pertinent part:

[2] When the complaint was filed the provisions in issue were codified as 42 U.S.C. 1395*o*(2)(A)(ii), and they are so cited in the opinion of the district court. During the pendency of the action the structure, but not the substance, of Section 1395*o* was amended, and the provisions in question are now found at 42 U.S.C. (Supp. II) 1395*o*(2)(B), which is the designation we shall use.

> No person shall be * * * deprived of * * * property, without due process of law * * *.

Section 1836 of the Social Security Act of 1935, added by Section 102(a) of the Health Insurance for the Aged Act of 1965, 79 Stat. 304, as amended, 42 U.S.C. (Supp. II) 1395*o*, provides:

> (1) is entitled to hospital insurance benefits under part A, or
>
> (2) has attained age 65 and is a resident of the United States, and is either (A) a citizen or (B) an alien lawfully admitted for permanent residence who has resided in the United States continuously during the 5 years immediately preceding the month in which he applies for enrollment under this part,
>
> is eligible to enroll in the [supplementary medical] insurance program established by this part [B].

STATEMENT

Appellees are Cuban refugees 65 years of age or older (A. 18). They were lawfully admitted to the United States in 1971. Appellees Diaz and Clara were not admitted for permanent residence, but were paroled into the United States by the Attorney General and remain here at his discretion, pursuant to 8 U.S.C. 1182(d)(5) (J.S. App. 17, n. 5). Appellee Espinosa has been lawfully admitted for permanent residence, but, like Diaz and Clara, has not yet resided in the United States continuously for five years (A. 18).[3]

[3] Appellees Diaz, Clara and Espinosa assert that they entered the United States, respectively, on February 4, 1971, July 8, 1971, and June 20, 1971 (A. 18, 33, 35).

On June 15, 1972, appellees Diaz and Clara applied to the Department of Health, Education, and Welfare for enrollment in the supplementary medical insurance program for the aged under Part B of the so-called "Medicare" Act (A. 30), an insurance program that covers part of the cost of physicians' services, home health care, diagnostic tests, and medical appliances. 42 U.S.C. 1395j, *et seq.* The Part B program, which supplements the hospital insurance plan for the aged under Part A of the Act,[4] is supported in part by monthly premiums paid by eligible individuals who choose to enroll. 42 U.S.C. 1395r(b). The Secretary denied the applications of appellees Diaz and Clara on August 4, 1972, for failure to meet the "lawfully admitted for permanent residence" and five-year residency requirements applicable to aliens under 42 U.S.C. (Supp. II) 1395*o*(2)(B) if they are not eligible for benefits under Part A (A. 30; see p. 3, *supra*, n. 3).

[4] Benefits under Part A are available to every individual who is 65 or older and is entitled to monthly insurance benefits under 42 U.S.C. 402 or is a railroad retirement beneficiary under 45 U.S.C. 228s-2 (42 U.S.C. 426(a), (c), 1395c). Benefits under those programs depend primarily upon age and calendar quarters of covered employment. See 42 U.S.C. 414(a). But cf. pp. 23–24, *infra*, n. 23, discussing 42 U.S.C. 428. In addition, under "transitional eligibility provisions," residents of the United States who attained the age of 65 before 1968 or had at least three quarters of coverage for each year between 1966 and the year in which that age was attained are also eligible under Part A, subject, if an alien, to eligibility provisions identical to those in issue here. 42 U.S.C. 426a. Appellees Diaz and Clara applied for insurance under Part A, but were ruled ineligible (A. 30, 33–36). Appellee Espinosa would also appear to be ineligible. This action, however, challenges only the eligibility requirements for Part B (A. 17–20, 45, 66–67).

On August 18, 1972, Diaz, later joined by Clara and appellee Espinosa,[5] instituted this action in the United States District Court for the Southern District of Florida on behalf of himself and all persons in the United States who have been or will be denied enrollment in the Part B Medicare program by reason of their inability to meet the dual alien residency requirements of 42 U.S.C. (supp. II) 1395*o*(2)(B) (A. 17–20). The complaint sought injunctive relief against enforcement of those residency requirements and a declaratory judgment that they violate the due process clause of the Fifth Amendment in denying supplementary medical insurance benefits to aliens who do not meet the residency tests while providing such benefits to citizens (A. 20).

A three-judge district court was convened pursuant to 28 U.S.C. 2282 (A. 13–16). After holding that it had jurisdiction pursuant to 42 U.S.C. 405(g)[6]

[5] Espinosa applied for enrollment in the Part B program on October 26, 1972, (cf. A. 50). It was stipulated (cf. A. 50) that his application would be deemed denied for failure to meet the five-year residency requirement of 42 U.S.C. (Supp. II) 1395*o*(2)(B).

[6] Under 42 U.S.C. 1395ff(b):

"Any individual dissatisfied with any determination * * * as to entitlement under * * * part B * * * shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title, and, in the case of a determination as to entitlement * * *, to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title."

42 U.S.C. 405(g) provides in relevant part:

"Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such deci-

despite the absence of a final decision of the Secretary of Health, Education, and Welfare (J.S. App. 16), and, after certifying the suit as a class action (J.S. App. 16–20),[7] the court held that 42 U.S.C. (Supp. II) 1395*o* is unconstitutional under the due process clause, insofar as it denies Part B benefits to immigrant aliens for failing to meet a durational residency requirement which is not imposed on United States citizens (J.S. App. 32–33). The court also held that the requirement that an alien be "lawfully admitted for permanent residence" is not severable from the durational residence requirement and is therefore unconstitutional and unenforceable (J.S. App. 33–38).

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sion by a civil action commenced within sixty days after the mailing to him of notice of such decision * * *."

42 U.S.C. 405(h) provides:

"The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter."

[7] The court certified a class consisting of all immigrants (*i.e.*, all aliens except those classified as non-immigrants under the Immigration and Nationality Act of 1952 (8 U.S.C. 1101(a)(15)) who are 65 or older and do not meet the requirements for Part B set forth in 42 U.S.C. (Supp. II) 1395*o*(2)(B) (A. 50–51).

The court also certified a subclass consisting of all immigrants 65 or older who are not eligible to enroll in Part B solely because of their failure to meet the five-year continuous residency requirement of 42 U.S.C. (Supp. II) 1395*o*(2)(B) (A. 51).

Without deciding whether the more rigorous "compelling governmental interest" standard is applicable, the district court held that the Act's durational residence requirement does not meet the "rational basis" test (J.S. App. 20–25). The court questioned whether the limitation of aliens' eligibility imposed by the durational residence test could be justified by a congressional purpose to preserve fiscal integrity, in view of the fact that half the cost of the Part B Medicare program is financed through premiums paid by those who choose to enroll. In any event, the court concluded that general federal revenues could not be preserved by invidious discrimination between citizens and aliens (J.S. App. 27–30). To the extent that the durational residence requirement represents a congressional judgment that aliens residing temporarily in the United States should not receive supplementary medical insurance coverage if they are not eligible for Part A benefits, the court found the five-year residence requirement an overly-inclusive classification to accomplish that purpose (J.S. App. 30–32).

The court's judgment permanently enjoined the Secretary from enforcing the alien eligibility requirements of 42 U.S.C. (Supp. II) 1395*o*(2)(B) (A. 70–72).

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Exercising its power to spend for the general welfare, Congress established in 1965 the novel "Medicare" program of federal medical assistance to the aged, consisting of two basic parts. Part A provides hospital insurance benefits and Part B—the only pro-

gram at issue in this case—provides a voluntary supplementary medical insurance program financed in part by premiums paid by those who choose to enroll. The Part B program is open to all who are eligible for Part A, which in turn is available to all who are 65 years old and are eligible for retirement benefits under either the Social Security Act or the railroad retirement program, without distinction between citizens and aliens.

In addition, other 65 year old persons are eligible for Part B if they are residents of the United States, except that aliens qualify under this alternative basis of eligibility only if they (1) have resided in the United States continuously for the five years preceding their enrollment in the program and (2) have been "lawfully admitted for permanent residence." 42 U.S.C. (Supp. II) 1395*o*(2)(B).

Appellees are citizens of Cuba, older than 65, who came to the United States in 1971 and do not meet one or both of these dual requirements of eligibility for Part B.

2. These requirements are a rational and valid exercise of Congress' plenary power to determine the privileges of aliens in the United States, particularly with respect to social welfare programs.

a. In effect, both requirements limit eligibility of aliens for Part B (if they do not qualify by reason of being eligible for retirement benefits) to those who have demonstrated a substantial and enduring connection to the United States. The conditioning of an alien's exercise of a privilege of citizenship upon a period of residence was specifically anticipated by

the Framers of the Constitution, when they vested in Congress the power to grant naturalization.

Recognizing the unique legal status of aliens, who derive legal protection from both international law and United States law, Congress has made varied judgments in extending the benefits of citizens to aliens throughout our history. The requirements challenged here are thus part of a longstanding and widespread pattern of differentiation by Congress between citizens and aliens. A holding that these requirements are beyond Congress' power would threaten the validity of hundreds of provisions of the United States Code.

The question of the appropriate stopping point in drawing lines between the rights and privileges of citizens and those of aliens is essentially a political question the determination of which has been entrusted exclusively to Congress, subject to a very limited degree of judicial scrutiny.

b. The validity of the challenged eligibility requirements for Part B should not be judged by the constitutional standards applicable to state residency requirements or other state laws pertaining to aliens. A requirement of residence for a specified period within the United States does not interfere with a person's right to interstate travel, and implicates no constitutional freedoms. In addition, because of Congress' plenary power to deal with aliens, the power of the states to regulate with respect to aliens is extremely limited. Accordingly, while alienage may be an inherently suspect category when used as a basis for classifications under state laws, thereby warranting strict

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scrutiny, alienage is not a suspect basis of classification under federal law.

Moreover, alienage is not an inherently immutable or highly visible trait, such as race, color or sex, with respect to which a test of strict scrutiny and compelling governmental need has been considered appropriate when it is used as a basis of classification.

c. In holding the durational residency requirement for Part B unconstitutional, the district court erred in ignoring the unique status of aliens and the plenary power of Congress to legislate with respect to them. Moreover, the court's conclusion that that requirement lacked a rational basis was founded on an inappropriately hypercritical scrutiny of the law.

3. The court also erred in concluding that the requirement that certain aliens be "lawfully admitted for permanent residence" is inseparable from the durational residency requirement, and in holding the dual requirements invalid as an entity.

a. While the varied versions of the Medicare bill considered by Congress differed with respect to a residency requirement for Part B, they all included a "lawfully admitted" requirement. Hence, had Congress thought the residency requirement beyond its power, it is evident that it would nevertheless have enacted the "lawfully admitted" requirement, particularly in view of the fact that its elimination would leave Part B open to any resident alien, including a diplomat or an illegal entrant.

b. The district court's doubts as to the constitutionality of the "lawfully admitted" requirement were

unfounded, for the same reasons that the durational residency requirement is constitutional.

ARGUMENT

I. IN EXERCISING ITS PLENARY POWER OVER IMMIGRATION AND NATURALIZATION, CONGRESS DID NOT OFFEND DUE PROCESS BY PROVIDING THAT CERTAIN ALIENS MUST SATISFY A DURATIONAL RESIDENCY REQUIREMENT TO BE ELIGIBLE FOR SUPPLEMENTAL MEDICAL INSURANCE

A. THE LEGAL STATUS OF ALIENS IS UNIQUE

Aliens in this country, like Indians, occupy a "unique legal status * * * of long standing" in relation to the federal government. *Morton* v. *Mancari*, No. 73-362, decided June 17, 1974, slip op., pp. 16, 19.[8] An alien may enjoy "such advantages as accrue from residence here without renouncing his foreign allegiance or formally acknowledging adherence to the Constitution * * *." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 585. The Court in *Harisiades* further described the unique legal status of aliens as follows (*id.* at 585-586; footnotes omitted):

> So long as one thus perpetuates a dual status as an American inhabitant but foreign citizen, he may derive advantages from two sources of law—American and international. He may

[8] Unlike such characteristics as race and national origin, alienage is neither a highly visible nor an "immutable" or "unalterable" trait (cf. *Johnson* v. *Robison*, No. 72-1297, decided March 4, 1974, slip op., p. 13, n. 14; *Lindsey* v. *Normet*, 405 U.S. 56, 73), but is essentially a legal condition subject to change in most cases by action of the alien. Upon acquiring citizenship, one's former status as an alien becomes immaterial for most purposes. See *Schneider* v. *Rusk*, 377 U.S. 163.

> claim protection against our Government unavailable to the citizen. As an alien he retains a claim upon the state of his citizenship to diplomatic intervention on his behalf, a patronage often of considerable value. * * *
>
> The alien retains immunities from burdens which the citizen must shoulder. By withholding his allegiance from the United States, he leaves outstanding a foreign call on his loyalties which international law not only permits our Government to recognize but commands it to respect. In deference to it certain dispensations from conscription for any military service have been granted foreign nationals. They cannot, consistently with our international commitments, be compelled "to take part in the operations of war directed against their own country." In addition to such general immunities they may enjoy particular treaty privileges.[9]

An alien is, of course, a "person" within the meaning of the Fifth Amendment (*e.g.*, *Wong Wing* v. *United States*, 163 U.S. 228, 238; cf. *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481, 489) and the Fourteenth Amendment (*e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369; *Truax* v. *Raich*, 239 U.S. 33, 39; *Takahashi* v. *Fish & Game Comm'n*, 334 U.S. 410, 419). But this does not mean that all legal distinctions between citizens and aliens are constitutionally barred. The Constitution itself grants numerous rights to the former that are withheld from the latter. See *Sugarman* v. *Dougall*, 413 U.S. 634, 651–652 (Rehnquist, J., dissenting).[10] And, in general "[u]nder our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen." *Harisiades* v. *Shaughnessy*, supra, 342 U.S. at 586 (footnotes omitted).

[9] Cf. *Hines* v. *Davidowitz*, 312 U.S. 52, 64–65. See generally Roth, *The Minimum Standard of International Law Applied to Aliens* (1949).

B. CONGRESS HAS BROAD CONSTITUTIONAL POWER "TO FIX THE CONDITIONS UNDER WHICH ALIENS ARE TO BE PERMITTED TO ENTER AND REMAIN IN THIS COUNTRY"

This Court has frequently recognized that Congress has broad prerogatives to deal with the special problems of aliens, as a part of its plenary constitutional power over immigration and naturalization. Article I, Sec. 8, Cl. 4, of the Constitution explicitly vests in Congress the power to establish uniform rules of naturalization, and this Court has held that the power of the federal government to admit and exclude aliens is also an inherent, essential incident of the national sovereignty established by the Constitution. See, *e.g.*, *Chinese Exclusion Case*, 130 U.S. 581, 603–604; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 705, 713; *Galvan* v. *Press*, 347 U.S. 522, 530–532; *Kleindienst* v. *Mandel*, 408 U.S. 753, 766.

Protraction of an alien's "ambiguous status within the country is not his right but is a matter of permission and tolerance," subject to "[t]he Govern-

[10] Indeed, the requirements that a person have been a citizen for nine years to become senator, and seven to be elected a member of the House of Representatives (U.S. Const., Art. I, Sec. 2, Sec. 3, Cl. 3), may be regarded as a form of durational residency requirements for aliens, at whom they were specifically aimed by the Framers. See, *e.g.*, 2 Farrand, *The Records of the Federal Convention of 1787*, 235–239, 268–272 (1966 rev. ed.).

ment's power to terminate its hospitality * * *." *Harisiades* v. *Shaughnessy, supra,* 342 U.S. at 586–587.

The benefits and burdens attaching to the status of aliens affect whether immigration to this country will be more or less attractive to citizens of other countries (cf. 2 Farrand, *The Records of the Federal Convention of 1787,* 235 (1966 rev. ed.)), and it is within Congress' power to determine whether and to what extent immigration of aliens is to be encouraged or discouraged. Accordingly, encompassed within Congress' "plenary power to make rules for the admission of aliens" (*Boutilier* v. *Immigration & Naturalization Service,* 387 U.S. 118, 123) is comparably broad power "to fix the conditions under which aliens are to be permitted to enter and remain in this country." *Flemming* v. *Nestor,* 363 U.S. 603, 616; accord, *Takahashi* v. *Fish & Game Comm'n, supra,* 334 U.S. at 419.

By vesting in Congress the power to establish rules of naturalization, the Framers of the Constitution authorized it, in Madison's words, to "fix different periods of residence as conditions of enjoying different privileges of Citizenship * * *." 2 Farrand, *supra,* at 235. See also *id.* at 268 (remarks of Hamilton). In consequence, the alien in the United States "has been accorded a generous and ascending scale of rights as he increases his identity with our society." *Johnson* v. *Eisentrager,* 339 U.S. 763, 770.

For aliens to achieve, through naturalization, the ultimate equality with citizens, Congress has since the earliest days imposed a residency requirement (now five years), to which other requirements have

since been added, such as the current requirement that an alien have been "lawfully admitted for permanent residence." 8 U.S.C. 1427(a).[11]

Moreover, while Congress has frequently extended rights or imposed burdens on "persons" or "individuals" without distinction between citizen and alien,[12] the United States Code contains literally hundreds of provisions reflecting precisely drawn distinctions between citizens and some or all aliens in the provision of both benefits and burdens.[13] As a result, while it may be true in a general sense that "[r]esident aliens, like citizens, pay taxes, support the economy, serve in the armed forces, and contribute in myriad other ways to our society" (*In re Griffiths,* 413 U.S. 717, 722), even in those activities aliens have in some circumstances been exempted by Congress from such obligations of citizenship.[14]

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[11] The first naturalization law, enacted in 1790 (1 Stat. 103), imposed a requirement of two years' residence within the United States. In 1795 the residency requirement was changed to five years within the United States and one year within the state or territory in which the naturalization petition was filed. 1 Stat. 414.

[12] *E.g.,* 42 U.S.C. 402(a) (retirement benefits); 42 U.S.C. 1983 (protection of civil rights).

[13] An extensive survey of existing provisions of the United States Code differentiating between citizens and aliens will be included as an Appendix to our brief in *Hampton* v. *Mow Sun Wong,* No. 73-1596, certiorari granted, June 10, 1974. We will send a copy of that brief to appellees' counsel when it is filed.

[14] *E.g.,* 50 U.S.C. App. 454(a) (liability for military training and service limited to citizens and aliens admitted for permanent residence); 16 U.S.C. 781 (prohibition against certain fishing beyond state territorial limits applies only to citizens and persons owing duty to laws of the United States); cf. 19 U.S.C. 1586(e) (prohibition against unloading vessel within specified off-shore waters applicable only to citizens).

Similarly, in determining which of the "different privileges of Citizenship * * *" (2 Farrand, *supra*, at 235) aliens should have, Congress has drawn lines throughout our history, but not always the same lines. Congress has for some purposes extended privileges only to a citizen of the United States,[15] while for other purposes it has also extended privileges to aliens who have been "lawfully admitted for residence"[16] or who

[15] *E.g.*, 7 U.S.C. 1922(1), 1941(1), 1961(b)(1) (loans to farmers and ranchers; Section 1961(b)(1) held unconstitutional in *Gomez* v. *Rutz*, D.P.R.), No. 326-73, decided May 29, 1974, *sub nom. Ramos* v. *United States Civil Service Commission* (in which the Solicitor General has authorized an appeal); 7 U.S.C. 1158(c) (indirect protection against foreign expropriation of property); 10 U.S.C. 8285(a)(1) (appointment as officer in regular air force); 12 U.S.C. 1427(a) (director of home loan bank); 22 U.S.C. 910 (foreign service officer); 25 U.S.C. 399 (lease of unalloted mineral lands within Indian reservations); 28 U.S.C. 1391 (limitations on federal court venue inapplicable to aliens); 28 U.S.C. 1861, 1865(b)(1) (service on a federal jury; held constitutional in *Perkins* v. *Smith*, 370 F. Supp. 134 (D. Md.), appeal docketed No. 73-1915); 28 U.S.C. 1872 (right to jury trial in original action in Supreme Court, derived from 1 Stat. 73, 81); 42 U.S.C. 410(a) (inclusion of employment outside the United States as basis for entitlement to retirement benefits); 42 U.S.C. 1973 (protection of right to vote); 42 U.S.C. 1982 (right to purchase property); 43 U.S.C. 145 (sale of public lands); 47 U.S.C. 303(l), (Supp. II) 310(a)(1) (aliens generally ineligible for radio station licenses); cf. 69 Stat. 699, as amended, 1 D.C. Code 1102(2) (right to vote in District of Columbia). See also 5 C.F.R. 338.101, limiting competitive civil service employment to citizens or persons owing permanent allegiance to the United States, held unconstitutional in *Hampton* v. *Mow Sun Wong*, *supra*, and in *Ramos* v. *United States Civil Service Commission*, *supra*.

[16] *E.g.*, 10 U.S.C. 8253 (enlistment in air force in peacetime); 42 U.S.C. 428(a) (transitional eligibility provisions for retirement benefits).

have declared their intention to become citizens.[17]

At times, Congress has made explicit the foreign relations dimensions of legislation concerning aliens, as where it has conditioned the right of an alien to exercise certain privileges of a citizen upon reciprocal treatment of United States citizens in the alien's own country,[18] or where it specifically makes refugees from a particular country, such as Cuba, eligible for benefits to which they would not otherwise be entitled.[19]

Although the details vary, the dominant theme of the conditions imposed by Congress on aliens' eligibility for benefits or privileges available to citizens is that they demonstrate some substantial and enduring connection with the United States. Aliens who satisfy that requirement have in the main been generously provided for and treated by Congress as if they had already achieved citizenship. Indeed, the solicitude with which Congress has treated aliens generally, and

[17] *E.g.*, 10 U.S.C. 311(a) (membership of males in United States militia); 30 U.S.C. 22 (exploration or purchase of public lands having valuable mineral deposits); 43 U.S.C. 161 (homestead land grants); 48 U.S.C. 1501, *et seq.* (ownership of land in territories or the District of Columbia).

[18] *E.g.*, 10 U.S.C. 7435(a) (leasing of naval fuel reserves); 15 U.S.C. 1126(b) (registration of certain trademarks); 26 U.S.C. 901(c) (deductibility of taxes paid to foreign governments); 28 U.S.C. 2502 (right to sue in Court of Claims); 42 U.S.C. 402(t)(2) (payment of retirement or disability benefits to aliens outside the United States); 46 U.S.C. 785 (suits in admiralty against the United States).

[19] *E.g.*, 42 U.S.C. 2713, 2742, 2949(3) (Cuban citizens who entered as parolees are eligible for certain Job Corps programs otherwise open only to citizens and permanent residents of the United States).

Cuban citizens like appellees in particular,[20] demonstrates that, despite their temporary inability to vote,[21] it would be inaccurate to characterize them as being in a position of "political powerlessness." *Johnson* v. *Robinson*, No. 72–1297, decided March 4, 1974, slip op., p. 13, n. 14.

C. THE RESTRICTIVE STANDARDS GOVERNING STATE POWER TO LEGISLATE ON THE SUBJECT OF ALIENS ARE INAPPLICABLE IN ADJUDGING THE CONSTITUTIONALITY OF AN ACT OF CONGRESS CONCERNING ALIENS

Because the Constitution vests exclusively in Congress the plenary power to legislate with respect to immigration and naturalization, the power of the states to regulate the rights, conduct, and affairs of aliens is very limited. *Hines* v. *Davidowitz, supra,* 312 U.S. at 66–68; *Graham* v. *Richardson,* 403 U.S. 365, 374–378; *Sugarman* v. *Dougall, supra,* 413 U.S. at 646-649. In light of the *prima facie* absence of state

[20] See, *e.g.*, 42 U.S.C. (Supp. II) 1382c(a)(1)(B)(ii); 118 Cong. Rec. S17015–S17016 (daily ed., October 5, 1972) (amendment offered by Florida's Senators to extend eligibility for various federal programs to aliens "otherwise permanently residing in the United States under color of law," so as to include Cuban refugees paroled into the United States); 87 Stat. 524–525 (inclusion of Cubans in limited category of aliens employed by the United States to whom compensation may be paid). See also p. 17, *supra*, n. 19.

[21] In fiscal year 1972, more than 100,000 aliens became naturalized citizens. Annual Report of the Attorney General, p. 196 (1972). Many resident aliens at any given time are potential citizens and voters, and are frequently close relatives of voters, so that their interests cannot lightly be disregarded by members of Congress. The large volume of private bills benefiting aliens enacted each year (*e.g.*, 86 Stat. 1527–1568, *passim*) demonstrates that they are not lacking in meaningful political power.

power to legislate on the subject of aliens, this Court has indicated that classifications in state law "based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Graham* v. *Richardson, supra,* 403 U.S. at 372 (alternative holding); *Sugarman* v. *Dougall, supra,* 413 U.S. at 642; *In re Griffiths, supra,* 413 U.S. at 721. But, because federal power to legislate with respect to aliens is expressly conferred, the proposition that alienage is a "suspect" category subject to "strict scrutiny" is not properly applicable to federal legislation.

While it is generally held that the equal protection prohibitions of the Fourteenth Amendment are also embodied in the due process clause of the Fifth Amendment (*e.g., Bolling* v. *Sharpe,* 347 U.S. 497, 499; *United States Department of Agriculture* v. *Moreno,* 413 U.S. 528, 533, n. 5; but cf. *Currin* v. *Wallace,* 306 U.S. 1, 14), it does not automatically follow that a statutory classification enacted by Congress is to be judged by the same standard as a state statute containing the same classification. Since it is one of the "constitutional prerogatives" (*Sugarman* v. *Dougall,* supra, 413 U.S. at 648) of Congress rather than the states to determine the conditions under which aliens will be permitted to enter and remain in the United States, an Act of Congress concerning aliens may well be constitutionaal even though an identical state statute would be invalid. Cf. *Head Money Cases,* 112 U.S. 580, 591–594; *Oyama* v. *California,* 332 U.S. 633, 646; *Richardson* v. *Ramirez,* No. 72–1589, decided June 24, 1974, slip op., pp. 28–29.

Compare *Roth* v. *United States*, 354 U.S. 476, 503–505 (Harlan, J., concurring in part).

D. THE JUDICIAL ROLE IN REVIEWING FEDERAL SOCIAL WELFARE LEGISLATION PERTAINING TO ALIENS IS EXCEPTIONALLY LIMITED

As this Court has repeatedly observed, federal "[p]olicies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government." *Galvan* v. *Press*, *supra*, 347 U.S. at 531. Such policies are "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 588–589. "[T]hat the formulation of these policies [toward aliens] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Galvan* v. *Press*, *supra*, 347 U.S. at 531. See *Lees* v. *United States*, 150 U.S. 476, 480. Indeed, "[s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference" (*Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 589), even when "First Amendment rights are implicated * * *" (*Kleindienst* v. *Mandel*, *supra*, 408 U.S. at 765) by the federal action concerning aliens.

The instant case, of course, implicates no First Amendment rights or other fundamental constitutional rights.[22] Nor does it involve punitive legislation

[22] Although a requirement of residence for a specified period within a specified state or locality has a potential impact upon

specifically intended to harm a particular group. Cf. *Johnson* v. *Robison*, *supra*, slip op. at 21, n. 18. Rather, it only involves eligibility for a novel medical insurance program—a form of social welfare legislation reflecting "judgments and preferences as to the proper allocation of the Nation's resources which evolving economic and social conditions will of necessity in some degree modify." *Flemming* v. *Nestor*, *supra*, 363 U.S. at 610. The validity of classifications in such programs should be upheld if "the line drawn * * * is rationally supportable, [and] the courts will not interpose their judgment as to the appropriate stopping point." *Geduldig* v. *Aiello*, No. 73–640, decided June 17, 1974, slip op., p. 10; see *Village of Belle Terre* v. *Boraas*, No. 73–191, decided April 1, 1974, slip op., pp. 6–7; *Jefferson* v. *Hackney*, 406 U.S. 535, 546, 549; *Richardson* v. *Belcher*, 404 U.S. 78, 81; *Dandridge* v. *Williams*, 397 U.S. 471, 485–487; *Williamson v. Lee Optical Co.*, 348 U.S. 483, 486–488.

In upholding the constitutionality of another provision of the Social Security Act, this Court observed in *Flemming* v. *Nestor*, *supra*, 363 U.S. at 611:

> it is not within our authority to determine whether the Congressional judgment expressed

exercise of a person's constitutional right to interstate travel within the United States (*e.g.*, *Shapiro* v. *Thompson*, 394 U.S. 618, 629–631, 641; *Memorial Hospital* v. *Maricopa County*, No. 72–847, decided February 26, 1974, slip op., pp. 4–6), a mere requirement of residence within the United States does not have that effect. Nor does it impermissibly restrict or penalize the exercise of any constitutionally protected right to foreign travel by aliens who have come to the United States. Cf. *Zemel* v. *Rusk*, 381 U.S. 1, 13–18.

> in that section is sound or equitable, or whether it comports well or ill with the purposes of the Act. "Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom." * * * Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.

In considering a proferred "rational basis" for a legislative classification, moreover, "it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision, as it is irrelevant that the section does not extend to all to whom the postulated rationale might in logic apply." *Id.* at 612; see *McGowan* v. *Maryland*, 366 U.S. 420, 426. In addition, under the rational basis test it is not fatal to the validity of a law, as it might be under the "strict scrutiny" test, that the classifications in question are either underinclusive (*Gedaldig* v. *Aiello, supra*, slip op. at 9–10), or overbroad (*Dandridge* v. *Williams, supra*, 397 U.S. at 484–485).

E. THE MEDICARE ACT'S DURATIONAL RESIDENCY REQUIREMENT IS RATIONALLY BASED

The supplementary medical insurance program involved in this case was established by Congress as part of the Health Insurance for the Aged Act of 1965 (79 Stat. 290), the so-called "Medicare" Act.

Like the original Social Security Act of 1935 (49 Stat. 620), which it amended, the Medicare Act is "a form of social insurance, enacted pursuant to Congress' power to 'spend money in aid of the "general welfare" ' * * *." *Flemming* v. *Nestor, supra*, 363 U.S. at 609.

Codified in Subchapter XVIII, Chapter 7, of Title 42, the Medicare Act augmented and was closely tied to the retirement program of the Social Security Act, which is codified in Subchapter II, Chapter 7, of Title 42. The Medicare Act consisted of two major programs: Part A, providing hospital insurance for the aged, financed by a special Social Security tax (42 U.S.C. 1395c–1395i–1), and Part B, providing supplementary medical insurance for the aged, financed equally by general revenues and current premium payments (42 U.S.C. 1395j–1395w). This case involves only eligibility for Part B.

A person eligible for retirement benefits under Subchapter II (or under the similar railroad retirement program), which does not generally distinguish between citizens and aliens,[23] is eligible for benefits

[23] A person is eligible for Subchapter II retirement benefits at age 65 if he has the required number of quarters of coverage—currently 40. 42 U.S.C. 402, 414(a)(2). Employment within the United States is a basis for coverage "irrespective of the citizenship * * * of [the employee] * * *." 42 U.S.C. 410(a). (Eligibility for railroad retirement benefits under 45 U.S.C. 228s–2 also qualifies a person for benefits under Part A.)

Subsequent to the enactment of Parts A and B, eligibility for retirement benefits under Subchapter II was extended to a limited category of otherwise ineligible persons over 72, subject, if they are aliens, to eligibility requirements identical to those contained in Part B. 42 U.S.C. 428(a). This provision was

under Part A (42 U.S.C. 402(a), 1395c),[24] and a citizen or alien eligible for Part A is also eligible for Part B. 42 U.S.C. (Supp. II) 1395*o*(1).

In addition, 65-year old residents of the United States are also eligible for Part B if they are citizens or if they are aliens who (1) have "resided in the United States continuously during the 5 years immediately preceding * * *" enrollment under the program, and (2) have been "lawfully admitted for permanent residence * * *." 42 U.S.C. (Supp. II) 1395*o*(2). These are the requirements whose validity is in issue in this case. Since many aliens are, however, eligible for Part B equally with citizens as a result of their eligibility for Part A benefits, the challenged requirements of Part B have the effect of excluding some, but not all, aliens who do not meet them.

The legislative history of the Medicare Act permits no doubt that Congress intended that aliens should not be eligible for Part B benefits on the same basis as citizens. The only disputed issue before Congress was "the appropriate stopping point" (*Gelduldig* v.

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adopted as a floor amendment to the Tax Adjustment Act of 1966 (80 Stat. 67) without presently relevant discussion. 112 Cong. Rec. 5288–5298. It replaced a similar provision enacted in 1965, as part of the Social Security Amendments (79 Stat. 379–380), which contained no limitations as to aliens.

[24] A resident of the United States is also eligible for Part A benefits under certain "transitional" provisions, if he attained 65 before 1968 and, if an alien, has been lawfully admitted for permanent residence and has resided continuously in the United States for the five years preceding application for benefits. 42 U.S.C. 426a.

Aiello, supra, slip op. p. 10) in classifying aliens as eligible, if they did not qualify by reason of being eligible for Subchapter II benefits.

As introduced, and as passed by the House, the Medicare bill (H.R. 6675, 89th Cong., 1st Sess.) made eligibility for Part B open to 65-year-old residents of the United States, except that aliens were eligible only if they had been "lawfully admitted for permanent residence." H. Rep. No. 213, 89th Cong., 1st Sess., pp. 34, 154. Eligibility for Part A depended primarily upon attainment of age 65 and entitlement to retirement benefits under Subchapter II (or under the railroad retirement program). In addition, a "transitional eligibility provision" extended eligibility for Part A benefits to other residents of the United States who did not qualify for retirement benefits, if they had become 65 prior to 1968 and either were citizens or had resided in the United States continuously for the ten years preceding application for benefits. *Id.* at 22–23, 142, 175.

Under the version of the Medicare bill passed by the Senate, eligibility for Subchapter II similarly resulted in eligibility for Part A. S. Rep. No. 404, 89th Cong., 1st Sess., pp. 24–25, 159. However, with respect to both Part B and the transitional provisions for Part A, aliens were eligible only if they had been lawfully admitted for permanent residence and had resided in the United States for the ten years (as to Part B) or six months (as to the transitional provisions) preceding their application. 111 Cong. Rec.

15934–15935; see H. Rep. No. 682, 89th Cong., 1st Sess., 39–40.[25]

In resolving the differences between the House and Senate bills, the conferees made eligibility for Part A result automatically in eligibility for Part B. In addition, the conferees agreed upon the dual requirements for aliens, under both the alternative method of eligibility for Part B and the transitional eligibility provisions for Part A, of five years' residence and lawful admission for permanent residence. H. Rep. No. 682, *supra*, at 8, 12, 39–40. In that form the bill was enacted.

F. THE DISTRICT COURT'S INVALIDATION OF THE STATUTORY RESIDENCY REQUIREMENT WAS UNWARRANTED

The district court concluded that the validity of the residency requirement of Part B should be judged by the "rational basis" test,[26] but then applied that test

[25] As reported to the Senate, the bill had contained ten-year residency requirements for both provisions (S. Rep. No. 404, *supra*, at 25, 39, 170, 194), but the residency requirement for the transitional provision for Part A was reduced to six months by an amendment on the Senate floor, with the suggestion that the conferees consider whether some period between six months and ten years would be more appropriate. 111 Cong. Rec. 15934–15935. The Senate discussion of the alien eligibility provisions indicated the foreign policy dimension of this issue, in that explicit reference was made to the manner in which certain other countries treat citizens of the United States and other countries with respect to eligibility for comparable social welfare legislation. *Id.* at 15935.

[26] The district court assumed without discussion that the deferral of appellee's eligibility for supplemental medical benefits under Part B constituted a deprivation of their "property." But the statute creating those benefits had been enacted before appellees came to the United States and placed themselves in the assertedly disfavored category. Hence, application of the challenged eligibility provisions does not deprive appellees of receipt of any statutory expectancy. Cf. *Arnett* v. *Kennedy*, No. 72–1118, decided April 16, 1974, slip op., pp. 16–20 (plurality opinion of Rehnquist, J.). Moreover, appellees Diaz and Clara, in entering the United States on a parole basis (see p. 3, *supra*), voluntarily accepted a traditionally tenuous legal status, the established prerogatives of which they are now seeking to enlarge. Compare *Leng May Ma* v. *Barber*, 357 U.S. 185, 188–189; cf. *id.* at 192 (Douglas, J., dissenting).

in an inappropriately hypercritical manner (cf. *Johnson* v. *Robison*, *supra*, slip op. at 15–16), with inadequate regard for the extraordinary power of Congress to legislate concerning aliens and the extensive deference ordinarily due to congressional judgments in such matters. The limitation on the eligibility of aliens for Part B imposed by Congress may be seen as reflecting a policy judgment concerning the desirable degree of attachment to this country requisite for a noncitizen to enjoy one of the varied statutory privileges of a citizen in the field of social welfare. In rejecting that judgment and in finding the durational residency requirement invalid, the district court was in reality substituting its own judgment on this matter of legislative policy, and in doing so it exceeded the proper bounds of judicial scrutiny in such cases.

Thus, acting on the assumption that "some aliens may legitimately be excluded from the supplemental medical benefits program * * *," the court concluded that the durational residency requirement was "invidiously discriminatory," if not "arbitrary and without rational basis," because the classification was

impermissibly "overbroad [in] that it excludes almost all aliens *qua* aliens * * *" (J.S. App. 31–32).[27] In employing the concept of "overbreadth," however, the court improperly applied to social welfare legislation a degree of strict scrutiny previously employed by this Court only where the challenged governmental action burdened the exercise of protected constitutional rights or was based upon a criterion as to which the government in question had limited power to act. See pp. 18–22, *supra*.

As we have noted, Congress has not entirely excluded aliens from eligibility for Part B benefits, though it had the power to do so. The durational residency requirement imposes on some aliens (those not eligible for Part B through eligibility for Part A) a requirement of substantial and enduring connection with the United States which Congress may rationally impose in extending to aliens the "different privileges of Citizenship * * *." 2 Farrand, *supra*, at 235. In searching for what it deemed a rational justification for the line drawn by Congress between aliens who are eligible and those who are not, the district court totally ignored the unique legal status of aliens in their relationship to the federal government. Indeed,

[27] The record does not support the court's premise that the five-year residency requirement would exclude "almost all aliens." Many aliens who have not resided continuously in the United States for the five years preceding their application for Part B might nevertheless, during earlier periods of residence, have become eligible for retirement-benefits and hence eligible under for both Part A and Part B.

the court's approach, if sustained, would threaten the validity of "an entire Title of the United States Code" (cf. *Morton* v. *Mancari*, *supra*, slip op. at 17) and many other laws as well—a result not required by the Fifth Amendment.

In view of the unique legal status of aliens, Congress' broad legislative power with respect to them, and the limited judicial scrutiny to which the rationality of social welfare legislation is subject, the five-year residency requirement for aliens under the alternative basis of eligibility for Part B benefits should have been upheld by the district court as a rational and valid exercise of congressional authority.

The differentiation between aliens and citizens reflected in 42 U.S.C. (Supp. II) 1395*o*(2)(B) as to duration of residency is one that was specifically anticipated by the Constitution's Framers (see p. 14, *supra*), and the general distinction between citizens and aliens has been recognized by Congress throughout our history (see pp. 15–17, *supra*). This classification does not offend due process now any more than it did when the Bill of Rights was adopted.[28]

[28] This case does not involve an effort by Congress to distinguish among aliens on the basis of some suspect category, such as race or religion, nor does it involve Congress' use of a person's alienage as a device for legislating with respect to matters that might otherwise be beyond its constitutional authority. Compare *Keller* v. *United States*, 213 U.S. 138. Accordingly, the Court need not consider here the outer limits of Congress' power to legislate with respect to aliens.

II. THE REQUIREMENT IMPOSED BY CONGRESS THAT ALIENS BE "LAWFULLY ADMITTED FOR PERMANENT RESIDENCE" IS SEVERABLE FROM THE DURATIONAL RESIDENCE REQUIREMENT AND IS CONSTITUTIONAL

After holding the requirement of five years' residence for certain aliens to be unconstitutional, the district court expressed doubt about the constitutionality of the requirement that those aliens also be "lawfully admitted for permanent residence" to be eligible for supplementary medical insurance benefits under Part B (J.S. App. 39–40), but held instead that it was invalid and unenforceable because it was inseparable from the durational residency requirement (J.S. App. 33–38). The court's ruling on the severability of this requirement was erroneous and the doubts about its constitutionality were unfounded.

A. The proper approach to the severability question was recently summarized by this Court in *Tilton* v. *Richardson*, 403 U.S. 672, 684:

> "The cardinal principle of statutory construction is to save and not to destroy." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). In *Champlin Rfg. Co.* v. *Commission*, 286 U.S. 210, 234 (1932), the Court noted
>
> > "The unconstitutionality of a part of an Act does not necessarily defeat * * * the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."

See also *United States* v. *Jackson*, 390 U.S. 570, 585.

As we have noted (see p. 25, *supra*), the versions of the Medicare bill originally enacted by the House and the Senate both included, as part of the basis for eligibility for Part B, the requirement that an alien have been "lawfully admitted for permanent residence." The bills differed, as to Part B, only in that the Senate bill also included a durational residency requirement (see p. 25, *supra*). Since Congress has on other occasions required that aliens be lawfully admitted for permanent residence in order to qualify for various benefits available to citizens (see p. 16, *supra*, n. 16), it is evident that Congress would have imposed that requirement here even if the durational residency requirement were beyond its power.

The district court acknowledged that the general savings clause of the Social Security Act (42 U.S.C. 1303) created at least a "presumption of separability" (J.S. App. 38), noted that the officials responsible for administering Part B treated the dual alien eligibility requirements as being separate criteria (*id.* at 36, n. 20), and concluded that "reasonable men might differ on this question" of severability (*id.* at 37). Nevertheless, rather than seeking to sustain the validity of the "lawfully admitted" requirement, the court held that the entire alien eligibility "must stand or fall as an entity" (*id.* at 38), because, according to the court's reading of the legislative history of the other provisions of Part B and Part A, they were part of a legislative "compromise" (*id.* at 36–38, n.21).

The district court erred, however, in thus relying upon its speculation concerning the essentially political question whether the proponents of one version of the bill would have agreed to recede on one point if they had not gained a concession on another. The test is, rather, whether Congress would have viewed the two parts of the law as being so integrally related as a matter of policy that it would have had no logical reason to enact one part if it could not validly enact the other.

Moreover, even under the district court's approach, the inclusion of a "lawfully admitted" requirement for Part B in both bills, and the lack of any dispute about this requirement, lead to a conclusion precisely opposite to that reached by the court.[29]

The error of the court's ruling on severability is further demonstrated by consideration of its consequences. By holding that Congress would have preferred no limitations on alien eligibility for Part B

[29] The court stressed the fact that, prior to enactment of the Medicare Act, the only provision joining a durational residence requirement for aliens with a "lawfully admitted" requirement was that in 8 U.S.C. 1427(a), governing eligibility for naturalization (J.S. App. 35, n. 19, 37, n. 21, 38, n. 23). While that appears to be true, at least as to laws presently in effect, that fact sheds little light on the question whether Congress, if it had known that the durational residency requirement was beyond its power, would have intended that aliens be eligible for Part B without limitation, or whether it would still have intended the "lawfully admitted" requirement to be given effect. Indeed, assuming *arguendo* that the durational residence requirement of the naturalization law were beyond Congress' power, it is not readily conceivable that Congress would have omitted from that law the requirement of "lawful admission for permanent residence."

if it could not impose a durational residency requirement, the court has in effect opened up Part B to all categories of aliens, including not only those residing here temporarily and having no attachment to this country (*e.g.*, diplomats), but also those here unlawfully. It is highly unlikely that the Congress that imposed the dual eligibility requirements of Section 1395*o*(2)(B) would have intended that result.

B. The constitutionality of the requirement that an alien be "lawfully admitted for permanent residence" stands at least on the same principles discussed concerning the residency requirement (see pp. 26–29, *supra*). Moreover, as this Court has indicated in other contexts, a residency requirement may be valid where a durational residency requirement would not. *Shapiro* v. *Thompson, supra,* 394 U.S. at 636; *Dunn* v. *Blumstein,* 405 U.S. 330, 342–344; *Marston* v. *Lewis,* 410 U.S. 679, 680; *Vlandis* v. *Kline,* 412 U.S. 441, 452–453. In the present case the requirement that an alien be "lawfully admitted for permanent residence" is rationally calculated to exclude from eligibility illegal entrants or other potentially long-term residents, such as diplomats and foreign correspondents, who lack a substantial and enduring tie to the United States.[30]

[30] For many, including appellees Diaz and Clara, the "lawfully admitted" requirement does not constitute a permanent exclusion. A parolee from Cuba may obtain adjustment of status to that of a person lawfully admitted for permanent residence after being physically present in the United States for two years if he meets the requirements for admission as a permanent resident (80 Stat. 1161, 8 U.S.C. 1255, note); admission as a permanent resident then depends upon the number of prior applicants relative to the applicable numerical limita-

Such a provision, even if not surgically precise, is within Congress' plenary power to legislate with respect to aliens.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted.

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AUGUST 1974.

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tion (8 U.S.C. 1151(a)), the waiting period for Cuba currently being about two years. The record does not reveal whether Diaz and Clara have sought adjustment of their status and admission for permanent residence, which they each became eligible to do in 1973. Many aliens in the position of appellees Diaz and Clara, who initially were not "lawfully admitted for permanent residence" because they were paroled into the United States as refugees, still hope to return to their homeland if political conditions there change sufficiently. It is natural that one in such a position might have a less substantial attachment to the United States than one who immigrated here in the usual manner and hence was "lawfully admitted for permanent residence."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1046

CASPER W. WEINBERGER, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,

Appellant,

v.

SANTIAGO DIAZ, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE APPELLEES

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IN THE

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OCTOBER TERM, 1974

No. 73-1046

CASPER W. WEINBERGER, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,

Appellant,

v.

SANTIAGO DIAZ, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE APPELLEES

OPINION BELOW

Appellees concur with Appellant that the official citation of the opinion of the district court is 361 F. Supp. 1 (S.D. Fla., 1973). Citation herein to the district

court opinion shall be as in Appellant's Brief to the Jurisdictional Statement; "(J.S. App.__)."

For the sake of simplicity, Appellees adopt the symbolic designations to the "Jurisdictional Statement" and to the "Appendix" (the latter jointly filed by the parties as a separately bound Appendix) contained in footnote "1" of Appellant's Brief at p. 1. Occasional references, however, will be made herein to matters not included in the separately bound Appendix, but which may be found in the original record ("R."), and in an Appendix attached to and bound together with this Brief (referred to as "App.").

JURISDICTION

Appellees agree with the gounds for Supreme Court jurisdiction set forth in Appellant's Brief at p. 2.

QUESTIONS PRESENTED

1. Whether one or both of the joint federal exclusionary statutory requirements that an alien be (1) lawfully admitted for permanent residence, and, (2) reside in the United States continuously for five years, in order to be eligible for the Supplementary Medical Insurance Program, 42 U.S.C. (Supp. II) §1395o(2)(B), otherwise available to all citizens solely upon reaching the age of 65, violates equal protection notions and/or the due process clause of the Fifth Amendment.

2. Should the court find one of the dual residency requirements to be constitutional, whether it is

severable from the other, thereby continuing its viability as a classification of aliens excluded from supplementary medical insurance benefits.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. Article I, Sec. 8, Cl. 4, of the Constitution of the United States provides:

> The Congress shall have power * * * [t]o establish a uniform Rule of Naturalization * * *.

2. The Fifth Amendment to the Constitution of the United States provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

3. Forty-Two U.S.C. (Supp. II) §1395o, provides:

> Every individual who,
>
> (1) is entitled to hospital insurance benefits under part A, or
>
> (2) has attained age 65 and is a resident of the United States, and is either (A) a citizen or (B) an alien lawfully admitted for permanent residence who has resided in the United States continuously during the 5 years immediately preceding the month in which he applies for enrollment under this part,
>
> is eligible to enroll in the (supplementary) insurance program established by this part (B).

STATEMENT OF THE CASE

Rather than adopt without reservation Appellant's "Statement," Appellees have chosen to set forth their own Statement of the Case which we believe will clarify the case and draw the issues to be decided by this Court more sharply than does the Appellant's Statement.

Appellees, Diaz and Clara, entered the United States on February 4, 1971 and July 8, 1971, respectively, as lawfully admitted Cuban parolees (A. 33-36), pursuant to the Attorney General's parole authority, 8 U.S.C. §1182(d)(5) (J.S.App. 17, n.5). On June 20, 1971, Appellee, Espinosa, was lawfully admitted to the United States for permanent residence (R.224).[1]

Appellees are all 65 years of age or older (A. 34-35; R. 214-215) and none of the Appellees has resided continuously in the United States for a period of 5 years (R.224).

On June 15, 1972, Appellees Diaz and Clara applied to the Department of Health, Education and Welfare for enrollment in the Supplementary Medical Insurance Program for the Aged under Part "B" of the Medicare

[1]Contrary to the assumption contained in the district court opinion (J.S. App. 14), and reasserted in Appellant's Statement at p. 3, that like Clara and Diaz, Appellee Espinosa is a Cuban national, the record does not reflect Espinosa's nationality (A. 18, 36; R.224). He is in fact a Columbian national who entered the United States from that country. In pointing out this error, Appellees do not intend to appear to be nit-picking, although it is conceded that the point may have little, if any, significance to the case. It does, however, establish the credibility of the class as recognized by the district court as including aliens other than Cubans.

Act (A.30), an insurance program that covers part of the cost of physicians services, home health care, diagnostic tests, and medical appliances. 42 U.S.C. §1395j, *et. seq.* The Part "B" program, which supplements the hospital insurance plan for the aged under Part "A" of the Medicare Act, is supported in part by monthly premiums paid by eligible individuals who choose to enroll. 42 U.S.C. §1395r(b). The Secretary denied the applications of Appellees, Diaz and Clara on August 4, 1972, for failure to meet the "lawfully admitted for permanent residence" and five year residency requirements applicable to aliens under 42 U.S.C. (Supp. II) §1395o(2)(B). On October 26, 1972 Appellee, Espinosa, applied for enrollment in Part "B" of the Medicare program. It was stipulated by the parties that his application would be denied since he had not resided continuously in the United States for a period of five years as required by 42 U.S.C. (Supp. II) §1395o(2)(B) notwithstanding the fact that, unlike Appellees Diaz and Clara, he met the other eligibility requirement of admission into the United States as a permanent resident. (R. 224-226).

On August 18, 1972 Diaz, later joined by Clara and Espinosa, instituted this action in the United States District Court for the Southern District of Florida on behalf of himself and all persons in the United States who have been or will be denied enrollment in the Medicare Part "B" Program by reason of their inability to meet the dual alien residency requirements of 42 U.S.C. (Supp. II) § 1395o(2)(B) (A. 17-20).

The complaint urged that the Court certify a class "of all persons in the United States who have been or will be denied enrollment" because of their inability to

meet both the permanent residency requirement and the 5 year durational residency requirement of the subject statute. The complaint further urged that a subclass be certified, represented by Espinosa, consisting of "all noncitizens in the United States who have attained permanent resident status" but who have been or will be denied enrollment solely due to their inability to meet the additional durational residency requirement of the same statute (A. 18-19).

A three judge district court was convened and held it had jurisdiction pursuant to 42 U.S.C. §405(g) (J.S. App. 14-16). The court then certified the suit as a class and subclass. However, because the named Appellees were not sufficiently representative of all aliens, it narrowed the definition of the class and subclass as proposed in the complaint from all aliens to "immigrants."[2]

[2] The use of the term "immigrant" to define the class and subclass by the district court is explained in the district court opinion (J.S. App. 20, n.8). Since Appellees have not cross-appealed nor otherwise questioned the class or subclass as defined by the district court, it is self-evident that the court's holding *applies only to the members of the recognized class and the challenged statute remains in effect as to aliens excluded from the recognized class.* Thus, the constitutionality *vel non* of the challenged statute as to the excluded aliens was not decided by the district court, is not before this Court, and remains an open question.

Despite the reformulation of the recognized class by the district court both the opinion of the district court and the Appellant's Brief, by and large, treat the class and subclass, for purposes of argument, as including all aliens in the United States who are unable to enroll in the Medicare Part "B" Program because of their inability to qualify for either one or both of the dual residency requirements. In this, the Appellees' Brief, we shall follow the same

The court held that 42 U.S.C. (Supp. II) §1395o(2)(B) is unconstitutional under the "equal protection notions inherent in the Fifth Amendment due process clause", insofar as it denies Medicare Part "B" benefits to "immigrant" aliens for failing to meet a durational residency requirement which is not imposed on United States citizens. (J.S. App. 33). The court also held that the requirement that an alien be "lawfully admitted for permanent residence" is not severable from the durational residency requirement as a matter of statutory construction and is therefore unenforceable (J.S. App. 33-38). The court further held (although unnecessarily in light of its previous formulation of the class as limited solely to "immigrants" (who by definition are not temporary residents of the United States)), that to the extent that the durational residency requirement represents a congressional judgment that aliens residing temporarily in the United States should not receive supplementary medical insurance coverage, the five year residency requirement creates an overly inclusive classification to accomplish that purpose (J.S. App. 30-32).

The court's judgment permanently enjoined the Secretary from enforcing the alien eligibility requirements of 42 U.S.C. (Supp. II) §1395o(2)(B) as to both the class and subclass (J.S. App. 39).

pattern, except to point out when the class as recognized by the lower court may affect the issues presented for decision. Obviously, if either or both of the dual residency requirements are held by this Court to be unconstitutional as to all aliens, they will likewise be unconstitutional as applied to the lesser included class of "immigrants" recognized by the district court.

The court in conclusion noted that, although unnecessary to its decision, it had considerable reservations as to the constitutionality of the permanent residence requirement. The only rational purpose perceived by the court for this requirement would be to screen out potential aliens likely to become public charges which would make it duplicative of other provisions of the Immigration and Nationality Act which have the same purpose. While this reason alone would probably be insufficient to declare it unconstitutional (although ineffective), when added to the overbreadth of the provision as a means of achieving the proposed legislative purpose, the court considered it of dubious constitutionality. This latter point was emphasized by the court by pointing out that after having declared the durational residency requirement unconstitutional, the requirement of a permanent residence status would "work a fundamental injustice in that a major part of the relief contemplated by this decision would thereby be rendered a nullity." *Diaz*, (J.S. App. 40). The court was referring to the thousands of Cuban parolees who cannot in practice achieve permanent residence status until they have resided in the United States for four years or more (J.S. App. 18-19, n.6).

ARGUMENT

Introduction and Summary

Appellant commences its brief by reference to the "unique status" theoretically enjoyed by both the alien

and the American Indian residing in this country, *Morton v. Mancari*, 42 U.S.L.W. 4933 (U.S. June 17, 1974). Appellant's Brief at p. 11. Unfortunately, the common characteristic suffered by these otherwise unrelated groups is that while "ordinary" citizens accept as inalienable the rights and benefits conferred by the Constitution, state and federal statutes, and customs, usages and practices of our nation, both the American Indian and the alien resident[3] alike have often had to fight their way into the "American" system. If anything, the advantage of holding dual "nationalities" while residing in the United States, is at best, a dubious one. Many United States resident-members of these groups have been made to suffer as "foreigners" in a new land, rather than partake in all the benefits and comforts enjoyed by ordinary citizens. Indeed, *Morton* gave constitutional sanction to preferential Indian employment legislation in what is obviously a judicial attempt (preceded by similar legislative efforts) to expiate the sins of the past visited upon American Indians, notwithstanding the resulting discriminatory effect it would have upon equally qualified members of the majority population.

Like the Indian, the alien residing permanently in the United States does not normally enjoy the dual comforts, pleasures, and protections that theoretically flow from dual nationality. He has come to these shores primarily for refuge, seeking surcease from political

[3]The term "alien resident" is used here, as it is throughout the brief, to distinguish between the alien whose expectations and understandings with the appropriate federal governmental authorities is that his status will be something closer to "permanent resident" than to that of a transient alien visitor to the United States. Cf., *Diaz*, (J.S. App. 35, n. 18). This point is further discussed, infra at Sec. II, pps. 38-43.

upheaval and persecution in his native land. Although initially looked upon with suspicion by his American neighbors, the United States has generally fulfilled its promise, enshrined at the base of the Statute of Liberty, by accepting and assimilating aliens as the "huddled masses yearning to breathe free." This country has traditionally offered sanctuary to the beleagured of other nations. The great immigrations of the late 19th and 20th centuries attest to this effort in international humanitarianism, and, in more recent days, the beckoning welcome to hundreds of thousands of Cuban refugees[4] escaping the ravages of totalitarian dictatorship in their native land confirm it.

It is these very individuals, many of whom are elderly and in need of medical attention otherwise beyond their financial reach[5] who compose a large part of the class adversely affected by the challenged provisions limiting Part "B" of the Medicare Program only to "permanent residents" who have resided in the United States continuously for five years. Cf., 111 Cong. Rec. 15,934, comments of Sen. Inouye.

The district court, while expressing doubts as to the constitutionality of the permanent residency require-

[4] Cuban Refugee Program Fact Sheet (HEW, March, 1974), (A. 40).

[5] Although Medicare is not limited solely to the poor or to the indigent, clearly it is this class of citizens and aliens which has the greatest need for its benefits. After all, it is the public contribution through general revenue funds which makes expensive medical services available to those who otherwise could not afford to pay for them. It is nevertheless to be observed that *all* enrolees, including the indigent, pay monthly premiums in order to contribute to the full solvency of the program. *Diaz v. Weinberger*, (J.S. App. 27).

ment, *Diaz*, (J.S. App. 39-40), found it unnecessary to reach that issue in light of its prior holding declaring the durational residency requirement unconstitutional *and* nonseverable from the resident alien provision, thereby causing the dual residency provisions to fall together. The Appellees, in this brief, while fully agreeing and adopting by reference, the "non-separability" holding of the district court, take the further position of challenging both the permanent residency requirement and the durational residency[6] requirement as concurrently violative of due process and equal protection notions of the Fifth Amendment. We are compelled to make this argument not only for the reasons suggested by the district court [Diaz, (J.S. App. 39-40)], but because we can find no sound constitutional justification for upholding the "permanent residency requirement" while at the same time striking down as unconstitutional its durational residency counterpart. Thus, our arguments contained hereinbelow, except when expressly noted, should be

[6] Short-term durational residency periods which have been approved by this Court in voter or election cases for the purposes of allowing time for administration and to avoid fraud are unlike the residency requirements under challenge in the instant case. In voter cases the issue of the location of actual residence of the voter is tied directly to the right to vote in a particular voting district. Thus, the state has a rational and, indeed compelling governmental interest, in requiring a short durational period of residence. *Marston v. Lewis*, 410 U.S. 679 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972). The residency requirements of the supplemental insurance program are unrelated to the reasons for "proof of residence" in the voting cases. Indeed, they are totally unrelated to the purposes of the medical insurance program. Cf., *Memorial Hospital v. Maricopa County*, 42 U.S.L.W., 4277, 4280-4281 n.15 (U.S. Feb. 26, 1974).

treated as applying to *both* the "lawfully admitted for permanent residence" and the five-year durational residency requirement contained in 42 U.S.C. (Supp. II) §1395o(2)(B).

ARGUMENT

I.

THERE IS NO RATIONAL BASIS NOR COMPELLING GOVERNMENTAL INTEREST IN DENYING LAWFULLY ADMITTED ALIENS THE RIGHT TO ENROLL IN THE SUPPLEMENTAL MEDICAL INSURANCE PLAN FOR THE ELDERLY AND THUS, BOTH THE PERMANENT RESIDENCY REQUIREMENT AND THE FIVE YEAR DURATIONAL RESIDENCY REQUIREMENT VIOLATE THE EQUAL PROTECTION CONCEPTS INHERENT IN THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

In declaring a durational residency requirement for aliens seeking welfare assistance unconstitutional in *Graham v. Richardson*, 403 U.S. 365 (1971), this Court held that

> aliens as a class are a *prime example* of a 'discrete and insular' minority . . . for whom . . . *heightened judicial solicitude is appropriate. Graham, supra*, at 372. (Emphasis supplied).

See also *Nielsen v. Sec. of Treas.*, 424 F.2d 833, 846 (D.C. Cir. 1970); *Jalil v. Hampton*, 148 U.S. App. D.C. 415, 460 F.2d 923 (1972); *Faruki v. Rogers*, 349 F. Supp. 723 (D.D.C. 1972), all requiring a "compelling governmental interest" to justify an alien classification.

Appellant argues that, despite the political hypocrisy of allowing the federal government to do that which is admittedly constitutionally barred to the states (see, e.g., *Memorial Hospital v. Maricopa County*, 42 U.S.L.W. 4277 (U.S., February 26, 1974)), the enumerated constitutional grant of authority over aliens given to Congress, but not to the states, provides the underlying hypothesis which negates the requirement of "strict judicial scrutiny" reserved for suspect class legislation enacted by the states. Appellant's Brief at p.19. We maintain, however, that even if the power of Congress over immigration and naturalization could somehow transmogrify "alienage" into a "non-judicially suspect" classification, a concession we are obviously not prepared to make, in the context of the delivery of public health care benefits, there is simply no constitutionally acceptable reason for differentiating between elderly citizen-beneficiaries and similarly situated elderly aliens.

A. There is no correlation between the classification and the purpose of the Public Welfare Program.

The cases of *Shapiro v. Thompson*, 394 U.S. 618 (1969), *Graham v. Richardson*, 403 U.S. 365 (1971), *In re Griffiths*, 413 U.S. 717 (1973), and *Sugarman v. Dougall*, 413 U.S. 634 (1973), all of which held, in one way or another, that the states may not, consistent with the Equal Protection Clause of the Fourteenth

Amendment, impose durational and permanent residency or citizenship requirements upon either residents or aliens as prerequisites to otherwise qualified beneficiaries of public programs make it irrelevant whether the source of the benefits are state or federal. In any event, the alienage exclusion provisions of the social welfare program under consideration herein cannot possibly be justified by the primary reason for the provisions advanced by the Appellant, i.e., the totally unrelated fact that eligibility depends on the "demonstra(tion) (of) a substantial and enduring connection to the United States." Appellant's Brief at pps. 8, 17, 28, 33. Virtually nowhere in Appellant's Brief do we find even a theoretically relevant correlation between the need for medical services and the length of residence or the degree of allegiance to the United States of the medically needy alien.[7]

[7]Cf., *Johnson v. Robison*, 42 U.S.L.W. 4313, 4317 (U.S. March 4, 1974); compare, e.g., Petitioner's Brief in *Hampton v. Mow Sun Wong*, No. 73-1596, filed in this Court in October, 1974, where at least some superficially plausible attempt is made to equate the conduct of the political and fundamental operations of the federal government with the justification for excluding aliens from federal civil service employment. But see, *Perkins v. Smith*, 370 F.Supp. 134, 136 (D. Md. 1974).

This is not to imply agreement with the merits of the government's argument in *Hampton*, but only to suggest that, in the instant case, not even a pretense of justification is advanced for treating the medically needy alien differently from the similarly situated elderly citizen. We are convinced that Respondents in *Hampton* will deal effectively with, and convice the Court that, the government's argument referred to in this footnote has no merit when measured against appropriate federal constitutional standards.

B. The right to publicly created health care benefits is a fundamental right, the denial of which by invidious classifications requires a compelling governmental interest.

The district court, in the instant case, in examining the constitutionality of the dual residency requirements of the Supplemental Insurance Plan, had difficulty in deciding whether to apply to the classification the "rational basis" test, or the "compelling governmental interest" test to determine its constitutionality (J.S. App. 20-25). But cf., e.g., *Perkins v. Smith*, 370 F. Supp. 134-135, 138 (D. Md. 1974) (compelling governmental interest test applied to a constitutional challenge excluding aliens from jury participation). At the time of the lower court's decision, however, it did not have the benefit of several recent Supreme Court decisions which would have clarified the issue, and established, beyond question, that the classifications challenged herein are not only "suspect", but result in the deprivation of "fundamental rights" which, for either case, may be constitutionally justified only by a "compelling governmental interest," rather than the traditional "rational basis" standard. The court below finally settled on a test which required that the classifications in question, to be held consitutional, must be both "rationally based *and free from invidious discrimination*" (J.S. App. 25). (Emphasis theirs).

In *Memorial Hospital v. Maricopa County*, 42 U.S.L.W. 4277 (U.S. Feb. 26, 1974), this Court had an opportunity to compare the relative "fundamentality" of the right to public welfare, *Shapiro v. Thompson*, *supra*, with the right to public health care, both denied

on the basis of similar durational residency requirements:

> In *Shapiro*, the court found denial of the basic "necessities of life" to be a penalty.
>
> * * *
>
> Whatever the ultimate parameters of the *Shapiro* penalty analysis, it is at least clear *that medical care is as much "a basic necessity of life" to an indigent as welfare assistance. And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements.*
>
> It would be odd, indeed, to find that the State of Arizona was required to (pay) welfare assistance to keep (the plaintiff) from discomfort of inadequate housing or the pangs of hunger but could deny him the medical care necessary to relieve him from the wheezing and gasping for breath that attend his illness. At 4280. (Emphasis supplied; citations and footnotes omitted).

The eight to one majority in *Memorial Hospital* concluded that a residency classification which serves to deny medical benefits is unconstitutional "unless shown to be necessary to promote a *compelling* state interest . . . " (Emphasis theirs). 42 U.S.L.W., *supra* at 4281.

C. The denial or deferral of publicly created health care benefits to a class solely due to the political unpopularity of the class is unconstitutional.

In another case decided subsequent to the district court decision below, *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973), this Court held that a congressional attempt to define the term "household" so as to exclude "hippies" (who, incidentally, unlike aliens, are not barred from the political process) from the food stamp program could not be sustained because it was an illegitimate attempt to harm a "politically unpopular group." Id. at 534.

With sporadic exceptions, the judicial history concerning aliens, prior to *Graham*, has not been particularly kind. Indeed, legislation which has had as its obvious purpose the oppression of aliens solely due to their political unpopularity was rather consistently upheld by this Court.

In 1914, legislation denying aliens the right to hunt and possess firearms for that purpose was upheld as constitutional. *Patsone v. Pennsylvania*, 232 U.S. 138 (1914). Aliens were denied the right to participate in public works projects in 1915. *Heim v. McCall*, 239 U.S. 175 (1915). In the 1920s, constitutional challenges to the common-law denial of the right of aliens to hold land were repeatedly rebuffed. *Webb v. O'Brien*, 263 U.S. 313 (1923); *Porterfield v. Webb*, 263 U.S. 225 (1923); *Terrace v. Thompson*, 263 U.S. 197 (1923); *Cockrill v. California*, 268 U.S. 258 (1925).[8] And, in 1927, the Court upheld a Cincinnati ordinance excluding aliens from operating poolrooms where undesirables allegedly congregated. *Clarke v. Deckebach*, 274 U.S. 392 (1927).

[8] The validity of these decisions has recently been called into question by *Oyama v. California*, 332 U.S. 633 (1948); moreover, these decisions would clearly not withstand constitutional scrutiny by current standards.

Notwithstanding the apparent trend of these early cases, we maintain that the trilogy of *Graham*, *Sugarman*, and *In re Griffiths*, has expressly rejected the notion that aliens may be treated oppressively and differentially merely because the majority population views lawfully admitted aliens as "foreigners" to be scorned and treated as constitutional outcasts.[9] Indeed, these three decisions have not only taken as axiomatic the proposition that political unpopularity is an illegitimate, and therefore, unconstituional basis for class legialation (*Moreno, supra*, at 435), but when the class adversely affected is composed of aliens, suspicion of *the class* has now been judicially replaced by *suspicion of the classification*! Cf., *Davis v. Richardson*, 342 F. Supp. 588 (D.C. Conn. 1972), aff'd 409 U.S.

[9]See, e.g., *In re Griffiths*, 413 U.S. 717, 719-720; *Sugarman v. Dougall*, 413 U.S. 634, 644-645; compare Justice Rehnquist's dissent in *Sugarman*, rejected by his eight brother justices, where he correctly points out that the foundations for this new and protective doctrine towards aliens are, from a jurisprudential analysis, chronologically inconsistent and highly selective in finding support in favorable case precedents, *Sugarman, supra*, at 653-656. We submit, however, that Justice Rehnquist's comments serve only to further support our conclusion that the decisions in these cases were purposefully and methodically reached thus forging a near-unanimous and consistent constitutional policy requiring that class legislation unfavorable to aliens may only be justified, not merely by the talismatic claim that the *power* to act constitutionally validates the action taken, but rather that the action taken must also be consistent with a "compelling governmental interest." Indeed, Justice Powell traces in *Griffiths*, the rise and fall of the anti-alien doctrine previously sustaining legal restrictions upon the rights of aliens, which is now no longer automatically accepted as constitutional by the Court. *In re Griffiths, supra*, at 720-721.

1069 (1972). Thus the Court has found support and comfort in the almost ancient pledge of equal protection for aliens under the laws, originally articulated in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) and such later cases as *Truax v. Raich*, 239 U.S. 33 (1915). The Court has, moreover, paid homage to the California case of *Purdy & Fitzpatrick v. California*, 456 P.2d 645 (1969), which drew into question the constitutional foundations of *Heim v. McCall, supra. Graham, supra*, at 376. And in commenting on 42 U.S.C. § 1981, which implements the Fourteenth Amendment by insuring "[a]ll persons" in every State "the full and equal benefit of all laws . . . for the security of persons and property"[10] the Court held that these principles:

> Embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges under non-discriminatory law. *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410, 420 (1948).

Justice Powell, in *Griffiths, supra*, at 719, stated in clear, uncomplicated and precise language what is unquestionably the underlying theme for the Court's attitudinal change towards alien classifications:

> From its inception, our nation welcomed and drew strength from the immigration of aliens. Their contributions to the social and economic life of the country was self-evident, especially during periods when demand for human resources greatly exceeded native supply.

See also, *Graham, supra*, at 376; cf., *Oyama v. California*, 332 U.S. 633-646 (1948).

[10]For an historical analysis and thorough discussion of the purpose of substituting the term "all persons" for "all citizens" in §1981, see *Guerra v. Manchester Terminal Corp.*, 350 F.Supp. 529, 533-536 (S.D. Tex. 1972).

Lower courts have, with relish, been fast to pick up on the new standard of judicial solicitude towards aliens, giving even further credibility and recognition to the rejection of the outmoded and repudiated anti-alien policy. The judiciary has with enthusiasm come to protect aliens from invidious legislation promulgated for no other reason than to harm or punish them as a politically unpopular group, whose own political impotence makes it virtually impossible for it to protect itself through normal political processes. See, e.g., *Hampton v. Mow Sun Wong, cert. granted*, No. 73-1956; *Jalil v. Hampton*, 460 F.2d 923 (D.C. Cir. 1972); *Sam Andrews' Sons v. Mitchell*, 457 F.2d 745 (9th Cir. 1972); *Chapman v. Gerard*, 456 F.2d 577 (3rd Cir. 1972); *Faruki v. Rogers*, 349 F. Supp. 723 (D.D. C. 1972); *Machado v. Dept. of Health and Rehab. Serv.*, 357 F.Supp. 890 (S.D. Fla. 1973); *Teitscheid v. Leopold*, 342 F. Supp. 299 (D.C. Vt. 1971); *Miranda v. Nelson*, 351 F. Supp. 735 (D. Ariz. 1972); *U.S. v. Khan*, 336 F. Supp. 354 (E.D. Pa. 1971); *Zarate v. Dept. of Health and Rehab. Serv.*, 347 F. Supp. 1004 (S.D. Fla. 1971); *Younus v. Shabat*, 336 F. Supp. 1137 (N.D. Ill. 1971); *Hosier v. Evans*, 314 F. Supp. 316 (D.C.V.I. 1970); *cf.*, *"Symposium on Durational Residency Requirements"*, *6 Suffolk L.Rev.* 565, 582 (1972).

Thus, the proposition is well settled that legislation which is promulgated solely for the purpose of harming a politically unpopular group is *ipso facto* illegitimate, – and unconstitutional. E.g., *In re Griffiths*, 413 U.S. *supra*, at 722, n.8; *U.S. v. Moreno, supra*, at 534. When the group adversely affected by the legislation happens to be "aliens"

> *the classifications involved . . . are inherently suspect and are therefore subject to a strict judicial scrutiny whether or not a fundamental right is impaired.*
>
> Appellant's reliance on *Dandridge v. Williams*, 397 U.S. 471 (1970) is . . . misplaced, since the classification involved in that case (family size) neither impinged upon a fundamental constitutional right nor employed an inherently suspect criterion. *Graham v. Richardson, supra*, at 376. (Emphasis supplied).

D. An alien's "substantial and enduring connection" to the United States is an unconstitutional basis for denying public health care benefits.

Thus, we again must examine the justification advanced by the government in the instant case for imposing dual residency requirements upon aliens, while allowing citizens similarly situated to immediately receive the benefits of Medicare Part "B" medical services. And again the primary reason articulated is that aliens must first "have demonstrated a substantial and enduring connection to the United States." Appellant's Brief at pps. 8, 17, 28, 33. There is absolutely no correlation, even under the rational basis test, between the alien's "substantial and enduring connection" with the United States and his need for supplemental medical insurance benefits. In short, the government finds in the "unique legal status" of aliens, a reason for granting them the "privilege" of receiving publicly supported medical benefits subject to, however, virtually any conditions the government wishes to

impose. Such reasoning was thoroughly rejected by this Court in *Graham v. Richardson, supra*, at 374.[11] Appellant has not shown in any way how the classification adverse to aliens advances a rational, legitimate, or compelling governmental interest. This discrimination between persons of equal need is at least as irrational as that condemned by this Court in *Jimenez v. Weinberger*, 42 U.S.L.W. 4948 (U.S. June 19, 1974).

E. The so-called *Dandridge v. Williams*, 397 U.S. 471 (1970) rational basis test is inapplicable to the constitutionality of classifications where finite and limited resources have little or no bearing on the creation of the class.

In *Jimenez*, the question presented was the constitutionality of a section of the Social Security Act which provided that certain illegitimate children could receive disability benefits only after establishing that the disabled wage earner parent contributed to the child's support or lived with him prior to the parent's disability. The government, relying on the so-called *Dandridge v. Williams*, 397 U.S. 471 (1970) "rational basis" doctrine relating to classifications involving social welfare programs, advanced the superficially plausible argument that the class of adversely affected illegitimates was created to avoid spurious claims. The district court agreed and upheld the classification. This Court reversed.

[11] Reaffirmed and emphasized in *Sugarman v. Dougall*, 413 U.S. 634, 644 (1973).

As it did in *Graham, supra*, at 376, this Court found in the government's *Jimenez* analysis a misreading of *Dandridge*. The Chief Justice, expressing the views of eight members of the Court, rejected the notion, also advanced by Appellant herein (Appellant's Brief at p. 21-22), that the *Dandridge* test of constitutionality is met by a finding of minimal rationality in social welfare programs, no matter how "illogical, . . . and unscientific" the class. *Jimenez, supra*, at 4949. The Court, having previously noted, in *Graham*, that the *Dandridge* case itself did not involve a "suspect classification" as did both *Graham* and *Jimenez* (at 4949), also noted that unlike *Dandridge*, *Jimenez* did not involve the problem of allocating finite fiscal resources—an obviously important consideration in the formulation of the *Dandridge* equal protection standard. Particularly pertinent to the instant case were the Chief Justice's comments comparing *Jimenez* to *Dandridge*:

> Here, by contrast, there is no evidence supporting the contention that to allow illegitimates in the classification of appellants to receive benefits would significantly impair the federal Social Security trust fund and necessitate a reduction in the scope of persons benefitted by the Act.
>
> * * *
>
> Accepting this view of the relevant provisions of the Act, we cannot conclude that the purpose of the statutory exclusion of some after-borne illegitimates is to achieve a necessary allocation of finite resources and, to that extent, *Dandridge* is distinguishable and not controlling. *Jimenez* 42 U.S.L.W., *supra*, at 4949.

Cf., *Davis v. Richardson*, 342 F. Supp. 588 (D.C. Conn. (1972); aff'd 409 U.S. 1069 (1972).

Although a fiscal argument in the instant case was advanced by the Appellant-Defendant in the district court, that court disposed of the argument in short order, additionally pointing out that the delays inherent in a durational waiting period for medical services will inexorably lead to a deterioration in the health of elderly aliens and

> appears more likely to increase, rather than decrease, the costs of the supplemental medical insurance program, unless the rather morbid presumption is indulged that mortality among members of the class prior to the time that they become eligible will more than offset such increases. *Diaz*, (J.S. App. 30).

See also, *Harrell v. Tobriner*, 279 F. Supp. 22, 27 (D.D.C. 1967). Appellant, apparently finding the district court's analysis persuasive, has totally abandoned any fiscal argument in its Brief before this Court.

F. The federal enumerated power over aliens is irrelevant to the test of the constitutionality of classifications of aliens unrelated to immigration, naturalization, citizenship or national sovereignty.

Refraining from attempting the impossible task of advancing a "compelling governmental interest" to justify the dual residency requirements at issue in this case, Appellant has chosen rather to argue that the alien classifications created by Congress are constitutionally sound because Congress, unlike the states, has passed these alien exclusionary provisions pursuant to the enumerated power of naturalization of Art. I, Sec. 8,

Cl. 4. Appellant argues that congressionally enumerated powers are a source so exclusively and absolutely awarded to Congress that legislative acts flowing therefrom are virtually free of judicial scrutiny.[12] Cf., Appellant's Brief at p. 20; more specifically, see Petitioner Hampton's Brief at p. 24 *et. seq.* Inherent in this so-called "plenary" power argument are two basic assumptions: (1) That while a State classification based on "alienage" is indeed "inherently suspect," a similar federal classification is not (Appellant's Brief at pps. 18-19) and; (2) That congressional authority over immigration and naturalization is so absolute and total that if it should choose to, it may without constitutional inhibitions, reach into the alien-resident's everyday activities, regardless of the relationship or correlation between those activities and his status as an alien.

(1) As to the first assumption: Underlying the assertion in *Graham, supra*, at 372 that "classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny," is the fact that:

> aliens are not simply politically disadvantaged as are members of other 'inherently suspect' classifications: they lack the power of the ballot entirely at both state and federal levels. Moreover aliens have endured a long history of open discrimination at the hands of the political process. *Diaz*, (J.S. App. 23).

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[12]Somewhat inconsistently, and without explanation or elaboration, Appellant concedes that "[a]n alien is, of course, a (person) within the meaning of the Fifth Amendment . . . and the Fourteenth Amendment" (Appellant's Brief at p.12). (Citations omitted). See also, e.g., *Johnson v. Robison*, 42 U.S.L.W. 4313, 4314, n.4; *Morris v. Richardson*, 346 F.Supp. 494, 499 (N.D. Ga. 1972).

Compare, *San Antonio School District v. Rodriguez*, 411 U.S. 1, 28, (1973), and *In re Griffiths*, 413 U.S. 717, 726-728 (1973). Perhaps as important as the exclusion from the voting franchise is the fact that aliens are almost totally excluded from political decisions which shape their lives. Cf., e.g., *Perkins v. Smith*, 370 F. Supp. 134, 136 (D. Md. 1974); *United States v. Thompson*, 452 F.2d 1333, 1346 (D.C. Cir. 1971); see also, ironically, the Appendix attached to the Petitioner's Brief in *Hampton*, listing the innumerable disabilities imposed by Congress upon *aliens qua aliens*; and, indeed, even today federal civil service employment is totally barred to aliens, on the pretext that federal public activities should be performed only by citizens, regardless of the relationship between the employee's job and his nationality.[13]

> Because the political system provides no check on such discrimination, there may well be instances when application of a compelling interest standard is warranted in review of state and federal enactments to protect aliens from discrimination resulting from their lack of political representation. *Diaz*, (J.S. App. 23-24).

E.g., *Jalil v. Hampton*, 460 F.2d 923 (D.C. Cir. 1972); *Faruki v. Rogers*, 349 F. Supp. 723 (D.D.C. 1972). The other side of the alienage coin which further warrants

[13]This exclusion has been declared unconstitutional in *Wong v. Hampton*, No. 72-1079 (9th Cir. decided Jan. 25, 1974) *cert. granted sub. nom., Hampton v. Wong*, No. 73-1956. Even if this pretext for job discrimination is found tenable by this Court it could hardly form the basis for justification for denying aliens medical treatment.

the "strict judicial scrutiny" test for legislation which adversely affects aliens as a group, regardless of its federal or state source, is that "aliens, like citizens, pay taxes, support the economy, serve in the armed forces,[14] and contribute in myriad other ways to our society." *In re Griffiths*, 413 U.S., *supra*, at 722; see also, *Graham v. Richardson*, *supra*, at 376; and *Sugarman v. Dougall*, 413 U.S., *supra*, at 645.

The disabilities of non-citizenship, in consideration of the contribution aliens have made to our society, show not only that aliens do indeed pay their dues, but also establish that the multiple bases for the "strict scrutiny" test for legislative constitutionality should be the same, regardless of the source of legislation, whether state or federal. Moreover, the undeniable fact that the federal government has exclusive authority regarding aliens, over immigration, naturalization and matters dealing with national sovereignty should mandate even *greater* scrutiny of federal than state activities which adversely affect the lives of aliens: After all, the Bill of Rights exists to limit *the abuse of authority*. Where, as with the states, there is little or no authority, a prophylactic effect will serve to limit or eliminate unconstitutional abuses. Cf., *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968).

(2) The second assumption, repeatedly urged throughout Appellant's Brief to the point of implying that Appellant's position is totally founded upon its

[14]Like resident aliens; immigrants, Cuban parolees, and conditional entrants were subject to military induction until the induction authority expired, and are currently subject to the same Selective Service registration requirements as are citizens. See, letter from Peter T. Straub, General Counsel, Selective Service System, dated October 1, 1974. App. 1a-2a.

credibility, is that the power to regulate aliens through Art. I Sec. 8 Cl. 4 is so absolute, total and "plenary," that the judiciary is required to acknowledge and accept, virtually without constitutional inquiry, all acts of Congress touching upon or affecting the lives of aliens, no matter how irrational, no matter how unrelated to admission to the United States, to immigration, naturalization, deportation, matters of national sovereignty, or, as in the instant case, no matter how unrelated to a publicly created social welfare benefit program.

An examination of the judiciary's treatment of other enumerated powers of Art. I immediately casts doubt upon the claim of unfettered authority advanced by Appellant. As stated in *United States v. Robel*, 389 U.S. 258, 264 (1967);

> When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated.

In the same case, but quoting from *Home Bldg & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 426 (1934): "[E]ven the war power does not remove constitutional limitations safeguarding essential liberties." *United States v. Robel, supra*, at 264; see also, *United States v. Cohen Grocery*, 255 U.S. 81 (1921).

Similarly, claims of "plenary" powers under Art. I, Sec. 8, Cl. 3, the international commerce clause, have been found less than absolute when they clash with other provisions of the Bill of Rights. See, e.g., *Head Money Cases*, 112 U.S. 580, 590-591, 593-94 (1884);

Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893).

With regard to the constitutional limitations on the so-called "plenary" powers of Congress over aliens, in *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) Justice Murphy stated in concurrence:

> The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and *Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all 'persons' and guard against any encroachment on those rights by federal or state authority*. (Emphasis added).

See also, *Wong Wing v. United States*, 163 U.S. 228 (1896) and *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931). As was so aptly put in *Ramos v. United States Civil Service Comm.*, 376 F. Supp. 361, 365 (D.P.R. 1974):

> Even before *Graham* the Supreme Court had held that aliens were broadly entitled to 'the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility.' *Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893). See *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) cited with approval in *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-97 n.5 (1953). *Graham, Sugarman,*

> and *Griffiths* are novel only in that they give constitutional standing to employment and welfare rights via the Equal Protection Clause.

The fact of the matter is that all the cases cited by Appellant in support of Congressional plenary power over aliens invariably involve matters of immigration, naturalization, or characteristics inherent in a notion of "citizenship," including the exercise of political rights and the involvement in political functions. The District of Columbia Court of Appeal in *United States v. Thompson*, 452 F.2d 1333 (D.C. Cir. 1971) found both a "suspect classification" and a fundamental interest. The court overtly recognized its duty to apply the compelling governmental interest and necessity test–regardless of the existence of a "plenary" power.

> One of the rights which the Constitution guarantees District (of Columbia) residents, in common with all residents of the United States, is the right not to be arbitrarily singled out for special treatment not accorded to others similarly situated. Thus, it is no response to contend, as the Government apparently does, that Congress was exercising its 'plenary powers' when it created such an irrational classification. *United States v. Thompson*, supra, at 1338. (Citations omitted).

See also, *Perkins v. Smith* 370 F. Supp. 134 (D. Md. 1974) (compelling interest test to determine right to exclude aliens from *federal* juries).

In *Ramos v. United States Civil Serv. Comm'n.*, 376 F. Supp. 361, 366 (D.P.R. 1974) the court held that:

> It would seem unthinkable that 'the same Constitution would impose a lesser duty (than the states) on the Federal Government' in its dealings with lawfully admitted permanent resident aliens–

> at least in those dealings unrelated to Congress' special responsibilities for naturalization.

The same court concluded

> that Congress itself, when legislating generally on matters not related to the furtherance of its naturalization responsibilities, may not single out aliens for discriminatory treatment forbidden to the states. Any other result would lead to a peculiar hierarchy of rules, in which the federal government would enjoy a license to engage in practices condemned by the courts as unfair and discriminatory when done by the states. *Ramos, supra*, at 366.

The many case citations which appear in Appellant's Brief for the purpose of establishing Congress' "plenary" power in matters relating to alienage do not, we maintain, diminish in any way the vitality of the "strict judicial scrutiny" test originally mandated by *Graham, supra*, in cases involving classifications based on alienage. These cases merely establish a "plenary power" theory which Appellees readily concede: That Congress does, by and large, through its naturalization powers, have clear and almost exclusive authority over aliens–so long as the power is exercised with regard to matters directly relating to alienage. Despite the sometimes excessive rhetoric of these cases, the facts of the cases invariably establish that the issue before the court relates directly, or at least indirectly, to immigration, deportation or other matters peculiar to alienage. Indeed, there is nothing in these decisions which diminishes Appellees' argument one wit, i.e., that legislation, be it federal or state, is (1) not any the less subject to the "strict judicial scrutiny" standard, (2)

must not be invidiously discriminatory (in the context of the instant case, this means the alien exclusion must relate to the purpose of the supplementary medical insurance program, 42 U.S.C. §1395k), and (3) must demonstrate it serves a "compelling governmental interest." In the instant case, the government bears a heavy burden (*Griffiths, supra*, at 721-22), in establishing that the alien's "substantial and enduring connection with the United States" is in any way related to either easing the financial burden of adequate medical care on those who cannot afford it, the expressed purpose of the Medicare Act, or to any other matter related to the purposes of the Act. The Appellant has cited many cases relating to aliens, but none are supportive of a "federal plenary power theory" which would negate either the requirement of "strict scrutiny" or the "compelling governmental interest test" to determine whether the residency requirements at issue herein are constitutional. Several cases cited by Appellant, however, deserve more than just passing comment to firmly establish they are not controlling precedent for Appellant's argument.

G. The cases of *Flemming v. Nestor* and *Richardson v. Belcher* are not controlling despite the analogous source of funding in the instant case.

The district court summarily dismissed the government's reliance on the cases of *Flemming v. Nestor*, 363 U.S. 603 (1960) (cited in Appellant's Brief at pps. 14, 21, 23) and *Richardson v. Belcher*, 404 U.S. 78 (1971)

(Appellant's Brief at p.21) holding that "Nestor and its progeny is inapposite to the extent that none of those cases involved even a colorable claim of discrimination." *Diaz*, (J.S. App. 21). While this holding is consistent with the district court's standard of constitutionality in the instant case, requiring *both* a "rational basis" and non-invidious discrimination, we believe these cases deserve closer scrutiny. But see, *Richardson, supra*, at 81 (no invidious discrimination).

In *Richardson*, after substantial contributions were made by employees and employers to a state disability program, an amendment to the federal Social Security Act required a proportionate reduction in federal social security benefits when the disabled wage earner received state disability benefits as a result of the same injury. The new federal social security provision, which effectively reduced the total disability benefits received by the injured wage earner, was attacked as a denial of equal protection under the Fifth Amendment to the Constitution. The Supreme Court sustained the constitutionality of the challenged statute, primarily relying on *Flemming v. Nestor*, 363 U.S. 603 (1960), (although, as indicated above, the Court additionally found the federal reduction in benefits free from invidious discrimination presumably because there was a rational basis for denying an injured wage earner double compensation for the same injury). We, however, go one step further and suggest that the provision challenged in *Richardson* may well be justified as a "rational basis" "to achieve a necessary allocation of finite resources . . ." See, *Jimenez v. Weinberger*, 42 U.S.L.W. 4948, 4949 (U.S. June 1974) (explained as

the ground for a similar holding in *Dandridge*, see this brief, *supra*, at 23).

As indicated above, the case of *Flemming v. Nestor*, *supra*, was dismissed as non-controlling by the district court in the instant case because it involved not even "a colorable claim of discrimination."

Challenged in *Flemming* was a provision which denied to the Plaintiff social security benefits to which he was otherwise entitled because he was a deported alien, having been found guilty of an act related to his former membership in the Communist party. Complicating the case was the fact that the specific Act under which the alien was deported was promulgated long after the alien's Communist affiliations had been terminated, and after his social security benefits had accrued. Appellant herein relies on *Flemming* for two propositions: (1) That Congress may "fix the conditions under which aliens are permitted to enter and remain in this country." Appellant's Brief at p. 14; and (2) that Congress may modify its "judgments and preferences as to the proper application of the Nation's resources which evolving economic and social conditions will of necessity in some degree modify." Appellant's Brief at p. 21.

(1) As to the first point, although we believe we have firmly established that congressional authority over aliens is not, in fact, absolute and "plenary" in all respects, we concede exclusive congressional authority over the deportation of unwanted aliens residing in the United States. Indeed, we submit that the incidental deprivation of social security benefits in *Flemming*, resulting from the deportation process, as it did, could stand alone as constitutional authority for the chal-

lenged provision. But this basis for the decision in *Flemming* provides no constitutional basis for depriving medical care benefits to aliens lawfully and properly within the United States where such deprivation is totally unassociated with the extraordinary authority Congress has over aliens.

(2) Appellant attempts to relate the holding in *Flemming* to congressional authority to allocate national resources. However, the power to spend is not uninhibited and unfettered by the protections of the Bill of Rights, particularly the due process clause of the Fifth Amendment. See, e.g., *Jimenez v. Weinberger*, *supra*; *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). Moreover, *Jimenez* held, there was "no evidence supporting the contention that to allow illegitimates in the classification . . . to receive benefits would significantly impair the federal social security trust fund and necessitate a reduction in the scope of persons benefitted by the Act." *Jimenez*, *supra*, at 4949. The Court points out that the only claim the Secretary advanced to support the challenged provision in *Jimenez* was "to prevent spurious claims and ensure that only those actually entitled to benefit receive payments." 42 U.S.L.W. *supra*, at 4949.

As was repeatedly pointed out in Appellant's Brief in the instant case, "the dominant theme of the conditions imposed by Congress on alien eligibility for benefits or privileges available to citizens is that they demonstrate some substantial and enduring connection with the United States." Appellant's Brief at p.17. To paraphrase Chief Justice Burger's conclusion in *Jimenez*; accepting this view of the relevant provisions of the Act, we cannot conclude that the purpose of the statutory

exclusion of some aliens in the United States from supplemental insurance benefits is to achieve a necessary allocation of finite resources; 42 U.S.L.W. *supra*, at 4949, or any other valid objective.

In *Johnson v. Robison*, 42 U.S.L.W. 4313, 4317 (U.S. March 4, 1974), the due process implications of reasons for creating a legislatively excluded class, and its relationship to the goals and purposes which would otherwise benefit that class, were clearly set forth:

> [O]ur analysis of the classification proceeds on the basis that, although an individual's right to equal protection of the laws 'does not deny . . . the power to treat different classes of persons in different ways [;] . . . [it denies] the power to legislate that different treatment be accorded to persons placed by statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' (Citations omitted).

The application of this test alone, regardless of the question of alienage as a "suspect classification," and regardless of any special "judicial solicitude" towards aliens must necessarily lead this Court to declare each of the residency requirements unconstitutional since "the dominant theme of the conditions imposed by Congress on aliens" (Appellant's Brief at p. 17) is totally unrelated to the purpose of the medical insurance program. Accordingly, they cannot be sustained under any constitutional theory.

H. The debates of the constitutional convention on residency requirements.

Appellants have made much of the arguments concerning residency requirements for aliens recorded in 2 Farrand, The Records of the Federal Convention of 1787 (1966 rev. ed.). Appellant's Brief at pps. 13, 14, 16, 28. However, an examination of the Records cited by Appellants makes it quite clear that virtually all constitutional discourse concerning residency requirements quoted or cited in Appellant's Brief have been taken out of context.

These constitutional debates, contrary to the implications of Appellant's Brief, concern themselves almost exclusively with the question of whether durational residency requirements should be expressly contained in the Constitution with respect to resident aliens who aspire to *public office*. See, e.g., 2 Farrand, Records of the Federal Convention, at 235-238, 268-269. The evidence is overwhelming that the constitutional debaters were concerned only, or at least primarily, with the realistic anticipation (perhaps then more than now) that the young nation might be threatened by the un-American ideas of aliens holding high public office, e.g., Congressmen and Senators. Particular concern was voiced over matters of foreign policy and foreign affairs, since high public officials are often called upon to deal with other nations and may find it difficult to disassociate themselves from their former national allegiances. Thus was argued the need for constitutional assurances to protect or at least minimize the likelihood of divided loyalties among newly immigrated public officials. In response to these fears it was suggested that

the Constitution expressly contain durational residency requirements for those aliens who aspire to decision-making positions which may have an impact on the foreign affairs of the United States. As we know, the Constitution eventually did adopt some of these suggestions. See, e.g., *Sugarman v. Dougall, supra*, 651-652 (Rehnquist, J., dissenting). However, the failure of Justice Rehnquist to convince any of his brother members of the Court that this historical analysis should lead them to hold as constitutional, residency requirements imposed on alien beneficiaries of social welfare programs, or even state civil service jobs, should be more than convincing evidence of the unpersuasiveness of the same argument advanced by Appellant in the instant case.

II.

PERMANENT RESIDENTS, IMMIGRANTS, CUBAN PAROLEES AND CONDITIONAL ENTRANTS.

Until now, as we have noted, our argument has made no mention of the fact that the class recognized by the district court does not include *all aliens* residing in the United States. This brief, *supra*, at 6, n.2. The district court certified the class as limited only to "immigrants" which the district court defined "in its technical sense" as comprising "immigrants" [as defined by the Immigration and Nationality Act (hereinafter referred to as the "Act"), 8 U.S.C. §1101(a)(15)], "conditional entrants, as well as to include those who, like Cuban parolees, may become immigrants through retroactive adjustments of status." *Diaz*, (J.S. App. 20, n.8).

Appellant's Brief, while noting, almost in passing, the *recognized* class as defined above, (Appellant's Brief at pps. 6, n.7 and 33, n.30), nevertheless, generally makes no distinction between *all aliens* and the recognized class for purposes of argument. The district court, despite a rather detailed definitional analysis of the elements of the recognized class[15] like Appellant made no substantive arguments, findings or decisions on the basis of the class as it had defined and limited it. But for the fact that we believe an analysis and understanding of the terms "permanent resident," "immigrant," "Cuban parolee," and the "conditional entrant," could conceiveably make a difference in either the ultimate outcome of the case, or in the manner in which the Court writes its opinion, we would be quite prepared to go along with both the Appellant and the district court in assuming the class, as limited and defined by the district court, has no substantive implications.

For reasons noted below, while we do not urge the Court to declare the challenged residency requirements unconstitutional as to *all aliens* (see this brief, *supra*, at 6, n.2) what we do suggest is that the members of the class *recognized* by the district court be deemed technically or functionally to be not merely "immigrants," but "aliens lawfully admitted for permanent residence" as that term is used in the supplemental medical insurance program, (42 U.S.C. (Supp. II) §1395o(2) (B). The effect of the suggested construction would be to totally remove both the question of the

[15]E.g., *Diaz*, (J.S. App. 16, n.4, 17, n.5, 18-19, n.6, 20, n.8, 35, n.18).

constitutionality of the "lawfully admitted for permanent residence" requirement and the "separability" issue from the case, leaving to be decided by this Court only the question of the constitutionality of the durational residency requirement. Cf., e.g., *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971). The elimination of these issues follows from the fact that if the class recognized by the district court is deemed, by reason of our suggested statutory construction, to be "aliens lawfully admitted for permanent residence," Appellees would have no standing to challenge the constitutionality of this residency requirement since they would then not be in an adverse position with respect to this requirement.

The statutory construction which we urge herein is merely an extension of the approach taken by the district court in defining the term "immigrant" used to describe the recognized class. The district court found sufficient reason to include conditional entrants and Cuban parolees (hereinafter referred to as "refugees") within the recognized class of "immigrants." The special status granted refugees, from the district court's point of view, made them "technically" (i.e., functionally) "immigrants." *Diaz*, (J.S. App. 20, n.8). We agree with the district court's analysis for several reasons.

It is to be observed that the Act's definition of the term "immigrant" includes "every alien except an alien who is within one of . . . (twelve) . . . classes of non-immigrant aliens . . ." The common characteristic of the twelve nonimmigrant classes is that they describe aliens who temporarily enter the United States, without any intention of abandoning their native country. These twelve categories do not even remotely describe

refugees, who, as will be shown below, enter the United States with the express congressional understanding that they will reside here permanently. One would conclude from this definition of the term "immigrant," that it includes both conditional entrants and Cuban parolees. However, this is not the case, because under the Act, to be lawfully admitted as an "immigrant" one must have been issued an "immigrant visa," 8 U.S.C. §1101(a)(16). Furthermore, implicit in 8 U.S.C. §1153(a)(7) (conditional entrants) and in 80 Stat. 1161 (1966)[16] (Cuban parolees), authorizing post-entry immigrant visas to refugees, is the fact that neither conditional entrants nor Cuban parolees enter the United States possessed of immigrant visas.

Thus, it is clear that conditional entrants and Cuban parolees are neither "immigrants" nor "nonimmigrants." They nevertheless gain lawful entry into the United States as refugees pursuant to 8 U.S.C. § 1153(a)(7) (conditional entrants) or 8 U.S.C. § 1182(d)(5) (Cuban parolees). Notwithstanding the fact that they are not included in the Act's definition of "immigrants," Congress has taken several measures which cumulatively justify the district court's decision to technically include them in the class as "immigrants."

First, as noted above, unlike "nonimmigrants" [8 U.S.C. 1101(a)(15)], refugees come to this country with the understanding that they come as permanent residents. In an amendment to a provision of the Social Security Act, which parallels the Medicare Act, Congress has authorizied welfare payments to the indigent blind, aged and disabled individual who is:

[16] See historical note to 8 U. S. C. §1255.

> . . . either (i) a citizen or (ii) an alien lawfully admitted for permanent residence or otherwise *permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the provisions of section 1153(a)(7) [conditional entrant] or section 1182(d)(5) [parolee] of Title 8).* 42 U.S.C. § 1382c(a)(1)(B) (Supp. II, 1973). (Emphasis supplied).

Moreover, unlike non-immigrants in this country refugees may be issued immigrant visas and may apply for permanent resident status, retroactive to their date of arrival. 8 U.S.C. §§ 1153(g) and (h) (conditional entrants); 80 Stat. 1161 (1966) (Cuban parolees). Additionally, as previously noted, refugees, at least since 1971, have been treated on an equal basis as citizens with respect to military service. App. 1a-2a; see also, Appellant's Brief at p. 17, n.19.

In *United States ex rel. Paktorovics v. Murff*, 260 F.2d 610 (2nd Cir. 1958), procedural due process rights reserved for permanent residents, were afforded a parolee in a deportation proceeding in recognition of his special refugee status. See also, *United States ex rel. Stellas v. Esperdy*, 250 F. Supp. 85, 87 (S.D.N.Y. 1966).

Finally, it is to be noted that the definition under the Act of a lawfully admitted "immigrant" [8 U.S.C. § 1101(a)(15)], is synonymous with the term "lawfully admitted for permanent residence," defined in relevant part as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws . . ." 8 U.S.C. § 1101(a)(20).

Thus, while refugees under the Act, definitionally are neither "immigrants" nor "nonimmigrants," they are clearly admitted to the United States with special immigrant-like status with the explicit congressional understanding that they "permanently reside in the United States under color of law," 42 U.S.C. § 1382c(a)(1)(B) (Supp. II, 1973).

If the district court had good and valid reasons to define refugees as "technical immigrants," there are equally valid reasons to deem the *recognized* class of "technical immigrants" as aliens *technically* "lawfully admitted for permanent residence" as that term is used in the supplementary medical insurance program. As initially noted, by recognizing the class certified by the district court as technically fulfilling the "lawfully admitted for permanent residence" requirement of the supplementary medical insurance program, both a constitutional issue and an issue of statutory construction (separability) would be removed from the case. We believe the construction of the "permanent residency" requirement as urged herein is reasonable and consistent with Congressional intent and accordingly urge the Court to adopt it. Cf., *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

III.

UNDESERVING ALIENS.

The district court in the instant case felt compelled to suggest that certain aliens may in fact be "undeserving" of supplemental medical insurance benefits. The court assumed that certain temporary or transient aliens, aliens who entered the United States

solely to receive medical treatment, and illegal aliens may constitutionally be legislatively excluded as beneficiaries of the program. The court held, however, that the dual requirements of "permanent residence" and five years of continuous habitation in the United States were just too much, and because of overbreadth, the exclusions were held inconsistent with the due process requirements of the Fifth Amendment to the Constitution. *Sugarman v. Dougall*, 413 U.S., 634, 643 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 637, 641-642 (1969); cf., *Memorial Hospital v. Maricopa County*, 42 U.S.L.W. 4277, 4281 (U.S. Feb. 26, 1974).

The Appellant did not make an "undeserving alien" argument in its Brief on appeal – and for good reason. If the reason for the residency requirements is to exclude "undeserving aliens," the requirements must be characterized as irrebuttable presumptions which conclusively deny the alien-applicant the opportunity to show that he does not fall within the category of undeserving aliens. Such irrebuttable presumption have recently, consistently and repeatedly been held to be unconstitutional. *Cleveland Board of Education v. LaFleur*, 42 U.S.L.W. 4186 (U.S. Jan. 21, 1974); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Department of Agriculture v. Murry*, 413 U.S. 508 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Bell v. Burson*, 402 U.S. 535 (1971).

Moreover, to the extent that "undeserving aliens" contemplates transients or temporary visitors these individuals are not covered by the recognized class, thus making the residency requirements applicable to them in any event. See this brief, *supra*, at Sec. II, pps. 38-43.

CONCLUSION

We believe the District Court decision in the instant case represents yet another step in what appears to be a pattern, recently but consistently, developed by the American judiciary, towards the realization of the historically articulated, but all too often ignored in practice, promise of equal treatment for aliens before the law.

Appellees concede that the Constitution grants to Congress as one of its enumerated powers the authority "to establish a uniform Rule of Naturalization," Art. I, Sec. 8, Cl. 4. Moreover, Appellees concede that the naturalization power of Congress, as have other congressionally enumerated powers, been construed by the courts as giving Congress virtually preemptive authority over the subject matter of these powers, in contradistinction to the authority of the states over the same matters. But merely because the federal legislature has greater authority to exercise certain powers than its state counterparts, is not to concede, nor does it at all follow, that the power, when exercised, is not tempered by, nor controlled by those provisions of the Bill of Rights which apply equally to both the federal and state governments. (Appellant does not seriously challenge the fact that the express equal protection provisions of the Fourteenth Amendment are, at least for purposes of this case, inherent within the due process notions of the Fifth Amendment).

The conclusions noted above are not, and have not, been contested by the Appellant. Nevertheless, the Appellant contends the congressional power over aliens is sufficiently expansive, absolute and "plenary," that it

authorizes the statutory exclusion of aliens from a public health care insurance program otherwise available to all citizens upon reaching the age of 65. The exclusion of aliens from the program is accomplished by authorizing enrollment only to aliens lawfully admitted for permanent residence who have resided in the United States continuously for a period of five years. Appellant argues that the "dominant theme" for allowing aliens to partake in benefits otherwise available to citizens, and thus the underlying reason for the residency requirements, is that aliens must first "demonstrate some substantial and enduring connection with the United States." Appellant's Brief at page 17.

Appellees maintain that where, as in the instant case, an "inherently suspect class" (aliens) are excluded from a publicly created program, partially supported by tax revenue funds (including the taxes paid by the excluded aliens) is established to provide a fundamental "necessity of life" (health care to the aged), that the reason for the exclusion must, to meet minimum standards of equal protection, be justified by a "compelling governmental interest." The articulated interest of the federal government, above quoted, as its "dominant" reason for the exclusion has not been shown by Appellant to be either compelling, rational, or even plausible.

A three judge district court unanimously held that the durational residency requirement challenged herein cannot be justified on a rational basis; that it is invidiously discriminatory, and is thus unconstitutional. The district court further held that the dual residency requirements were nonseparable, and thus, without reaching the issue of the constitutionality of the

"admitted for permanent residence" requirement, declared both requirements invalid and unenforceable. We have argued in this brief that *both* residency requirements be declared unconstitutional. The holding and reasoning of the district court is not inconsistent with this argument. We thus, alternatively, urge this Court to affirm the district court decision on the grounds stated therein.

We have suggested, in this brief, yet a third alternative which would result in the affirmance of the district court decision. This Court may deem the class certified by the district court to be a class of aliens "admitted for permanent residence" within the meaning of the medical insurance program, as a matter of statutory construction. See this brief, *supra*, at Sec. II, pps. 38-43. By affirming the district court's holding declaring unconstitutional the durational residency requirement, and construing the certified class as above suggested, the need to determine either the question of separability or the issue of the constitutionality of the "admitted for permanent residence" requirement would be obviated.

We believe this Court can, with statutory and constitutional justification, affirm the district court's decision by any of three suggested routes. The primary theory underlaying all of these possible avenues to affirmance (with the exception of the nonseparability decision of the lower court) is that Appellant has offered no constitutional justification for the residency requirements challenged in this case. For this Court to accept Appellant's "plenary power theory" is to totally ignore, indeed discredit, Lord Acton's admonition, that "absolute power corrupts absolutely," for this is surely

the bottom line of Appellant's "plenary power" argument in favor of a rule without a reason. And thus, for good sound and constitutional reasons we urge this Court to affirm the district court's decision either, (1) by adopting the lower court's reasoning, or, (2) by declaring both residency requirements to be a denial of equal protection of the laws to aliens, or, (3) by construing the certified class as technically meeting the "admitted for permanent residence" requirement, while concurrently declaring the durational residency requirement unconstitutional.

Respectfully submitted,

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APPENDIX

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
1724 F STREET NW.
WASHINGTON, D.C. 20435

OCT 1 1974

Dear Mr. Feinberg:

Reference is made to your letter of September 16, 1974. A completely comprehensive answer is not possible because of the many variables with individual cases.

Generally, however, subsequent to the 1971 Amendments to the Selective Service Act, it would appear that Cuban parolees were and are required to register with the appropriate local board of the Selective Service System. As you correctly stated in your letter, Title 50 App. Section 453 of the United States Code requires every male person of a certain age residing in the United States to register. The exception to Section 453 pertains only to an alien "lawfully admitted to the United States as a nonimmigrant" under Section 101(a)(15) of the Immigration and Nationality Act, as amended, which section specifically denotes the classes of nonimmigrants exempt from registration. Cuban parolees as a class do not fall within the nonimmigrants designated under that section.

Therefore, under the present law Cuban parolees would be required to register and necessarily be subject to induction along with other eligible males. (At the present time no inductions are taking place since the induction authority under Section 17(c) of the Military Selective Service Act has expired).

Prior to the 1971 Amendment, only male aliens "admitted for permanent residence" could have been inducted into the military service. Title 8 Section 1182d(5) of the United States Code clearly states that parolees are not to be admitted for permanent residence. Thus, under the prior law, Cuban parolees were not subject to induction. However, they were required to register.

It is also interesting to note that under a 1966 Public Law (89-732) Cuban parolees could change their status from nonimmigrant upon application to the Attorney General. Therefore, the status of the "Cuban parolee" varied with the changes in the law. Consequently, each

case must be synthesised in order to determine the status of the individual.

If we can be of further assistance please advise.

Sincerely,

FOR THE DIRECTOR

/s/ Peter T. Straub
Peter T. Straub
General Counsel

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1046

CASPAR W. WEINBERGER, AS SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE OF THE UNITED STATES,
Appellant,

v.

SANTIAGO DIAZ, JOSE A. CLARA, AND VICTOR CARLOS ESPINOSA,
Appellees.

On Appeal from a Judgment of the United States District Court for the Southern District of Florida

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1046

CASPAR W. WEINBERGER, AS SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE OF THE UNITED STATES,

Appellant,

v.

SANTIAGO DIAZ, JOSE A. CLARA, AND VICTOR CARLOS ESPINOSA,

Appellees.

On Appeal from a Judgment of the United States District Court for the Southern District of Florida

---

BRIEF OF ASSOCIATION OF IMMIGRATION AND NATIONALITY LAWYERS, AMICUS CURIAE

STATEMENT OF INTEREST

This brief is filed with the consent of both parties herein.

The Association of Immigration and Nationality Lawyers is a national organization chartered under the laws of the State of New York. Its members are attorneys specializing in immigration, naturalization and nationality matters. Our interest in supporting the views of the opinion below prompts us to file this brief.

QUESTION PRESENTED

Whether 42 U.S.C. 1395o (1970) [Section 1836 of the Social Security Act] which authorizes enrollment in medical insurance coverage (including a substantial part of cost of physician's services, surgery, health care, diagnostic tests and medical appliances) by persons over 65 who are United States citizens and lawfully resident aliens for five years and excludes aliens lawfully here for periods under five years creates an unconstitutional discrimination violating equal protection as embodied in the due process clause of the Fifth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution of the United States provides in part that:

> "No person shall***be deprived of life, liberty or property without due process of law,***."

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. 1395o (1970) (Section 1836 of the Social Security Act) provides:

> "Every individual who –

> (1) has attained the age of 65, and
>
> (2) (A) is a resident of the United States, is either (i) a citizen or (ii) an alien lawfully admitted for permanent residence who has resided in the United States continuously during the 5 years immediately preceding the month in which he applies for enrollment under this part, or (B) is entitled to hospital benefits under part A,
>
> is eligible to enroll in the insurance program established by this part."

STATEMENT

Appellees are Cuban refugees. Espinosa, age 73, was lawfully admitted for permanent residence in 1971. Diaz, age 77 and Clara, age 67, were lawfully admitted in 1971 as parolees and have not yet acquired permanent residence. They seek enrollment in medicare benefits under 42 U.S.C. 1395o (1970) [Section 1836 of the Social Security Act]. Diaz's and Clara's applications have been formally rejected. Espinosa's application will result in a similar action. Each appellee sought injunctive relief against the enforcement of the statute upon the ground that it violates equal protection. The three judge court below granted the requested relief and this direct appeal followed.

I

THE EQUAL PROTECTION CLAUSE PROHIBITS INVIDIOUS DISCRIMINATION AGAINST ALIENS

The Fourteenth Amendment guarantees equal protection to all persons within the jurisdiction of a state. 42 U.S.C.

1981 (1970), implementing the Amendment, insures all persons in every state "the full and equal benefit of all laws*** for the security of persons and property." These provisions:

> "embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory law." *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 420 (1948).

They pledge to aliens the protection of equal laws. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

Discriminations against aliens have been declared invidious and in violation of equal protection where a state restricted their right to operate a business, *Yick Wo v. Hopkins*, *supra*, their right to work, *Truax v. Raich*, 239 U.S. 33 (1915), or where commercial fishing licenses were denied, *Takahashi v. Fish and Game Commission*, *supra*.

However, a Cincinnati ordinance precluding aliens from conducting poolrooms where undesirables congregate has been upheld, *Clarke v. Deckebach*, 274 U.S. 392 (1927), and the denial of alien participation in public works projects has likewise been immune to attack. *Heim v. McCall*, 239 U.S. 175 (1915); but see *Purdy and Fitzpatrick v. California*, 79 Cal. Rptr. 77, 456 P.2d 654 (1969). Denial to aliens of the right to hunt and possess firearms for such purpose has also been upheld. *Patsone v. Pennsylvania*, 232 U.S. 138 (1914). The common law denial of the right of the right of aliens to hold land, originally sanctioned by this Court, *Webb v. O'Brien*, 263 U.S. 313 (1923); *Porterfield v. Webb*, 263 U.S. 225 (1923); *Terrace v. Thompson*, 263 U.S. 197 (1923); *Cockrill v. California*, 268 U.S. 258 (1924), has been called into question by *Oyama v. California*, 332 U.S. 633 (1948).

These early cases denying aliens participation in public works projects, in natural resources and the right to own land have been the subject of sharp criticism. See *Konvitz, The Alien and the Asiatic in American Law* (1946), Chapt. 5, The Right of Aliens to Own Land; Chapt. 6, The Right of Aliens to Work; Chapt. 7, The Right of Aliens to Share in Natural Resources.

Today, no alien is any longer racially ineligible for citizenship (8 U.S.C. 1422). The basis for discrimination against ineligible aliens in the California land laws no longer obtains. It is now considered odious and contrary to our national welfare to discriminate on the basis of race or national origin against persons in public accommodations or in federally financed assistance programs, 42 U.S.C. 2000(a)(1); 2000(d). Segregation in the utilization of our public educational facilities upon the basis of race or national origin violates equal protection. *Brown v. Board of Education*, 347 U.S. 483 (1954); 349 U.S. 294 (1955); *McLauren v. Oklahoma*, 339 U.S. 637 (1950); *Gonzales v. Sheehy*, 96 F. Supp. 1004 (D. Ariz., 1951). Since 1945 we have subscribed to the United Nations Charter, 59 Stat. 1046, and in 1948 we sponsored the Universal Declaration of Human Rights which sought to ensure equal protection in employment and ownership of property regardless of national origin. (Articles 2, 7, 17, 23, Universal Declaration of Human Rights.)

In *Graham v. Richardson*, 403 U.S. 365 (1971) denial of welare benefits by Pennsylvania to aliens who failed to file a declaration of intention during a prescribed period and by Arizona to aliens who had less than fifteen years of residence were declared violative of equal protection.

Sugarman v. Dougall, 413 U.S. 634 (1973) ruled that exclusion of aliens by the New York Civil Service Law violated the Fourteenth Amendment's equal protection clause. *In Re Griffiths*, 413 U.S. 717 (1973) found a similar infirmity in the exclusion of aliens from permission to take Connecticut bar examinations.

These recent decisions reflect the present regard of this Court for the dignity of the individual and the equality of persons in our midst to the enjoyment of life.

II

THE DURATIONAL RESIDENCY REQUIREMENT FOR ALIENS FOR MEDICARE BENEFITS CREATES AN INVIDIOUS DISCRIMINATION

(A)

HISTORY OF SOCIAL SECURITY LAW

The Federal Social Security Act of 1935 (42 U.S.C. 301, *et seq.*, 49 Stat. 620) was part of a broad legislative program to counteract the depression of 1929. The hope behind the statute was to save men and women from the rigors of the poorhouse and the fear of such a fate. *Helvering v. Davis*, 301 U.S. 619 (1937). The Act recognized unemployment as a national problem and sought to solve it by the cooperative legislative efforts of state and national governments. *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495 (1937).

Programs of retirement insurance, survivors insurance, disability insurance, hospital and medical insurance, unemployment insurance, public assistance, services for maternal

and child welfare, workmen's compensation, railroad retirement, veterans benefits and government employees retirement were adopted. The objectives of these federal-state programs were, *inter alia* "to keep individuals and families from destitution; to help them attain economic and personal independence; to keep families together; to give children the opportunity of growing up in health and security." *Social Security Handbook* (4th Ed. G.P.O.), p. 425.

In discussing the medicare benefits under the Social Security Act, the Social Security Handbook *supra*, p. 345 observes:

> "Most interested people will, upon reaching age 65, be residents of the U.S. and either citizens or lawfully admitted aliens who meet the length of residence requirements."

The statute, 42 U.S.C. 1395o (1970), [Section 1836 of the Social Security Act] requires citizenship or lawful permanent residence for five years to be eligible for medical insurance coverage which includes the cost of physician's services, surgery, health care, diagnostic tests and medical appliances. 42 U.S.C. 1395k, 1395x(m) and (s) (1970). One-half of this insurance program is financed by premiums paid by individuals 65 or older who choose to enroll. 42 U.S.C. 1395r(b) (1970). Excluded from eligibility are aliens lawfully admitted for permanent residence who have been here less than five years, as well as aliens lawfully admitted who claim political asylum (who are paroled into the United States) and have not yet acquired permanent residence status.

(B)

HISTORY OF FIVE-YEAR LAWFUL RESIDENCE REQUIREMENT OF NATURALIZATION LAWS

Our naturalization statute, 8 U.S.C. 1427 (1970), requires five years lawful residence as a prerequisite for naturalization for most persons. Those married to American citizens are eligible after three years. 8 U.S.C. 1430 (1970). Veterans are given special exemptions from the residence requirement, 8 U.S.C. 1439 (1970).

The original naturalization statute (Act of March 26, 1790, 1 Stat. 103) prescribed two years of lawful residence for naturalization. The Act of January 29, 1795 (1 Stat. 414) increased the period to five years. The Act of June 18, 1798 (1 Stat. 566) enacted during a period of restrictive legislation, enlarged the period to fourteen years. The Act of April 14, 1802 (2 Stat. 153) restored the qualifying period to five years and this has been retained in every subsequent revision of the naturalization laws [Act of March 3, 1813, 2 Stat. 809, 811; Act of June 26, 1848, 9 Stat. 240; Act of June 29, 1906, 34 Stat. 598; Nationality Act of 1940, 54 Stat. 1142; Immigration and Nationality Act of 1952; 8 U.S.C. 1427 (1970)].

It has been stated that:

> "The manifest purpose of such residence requirements has been to establish a period of probation during which the applicant might be enabled to learn our language, to familiarize himself with our language, customs and institutions, to shed foreign attachments, and to acquire attachments to the principles of our Constitution and government, to demonstrate ability to conduct himself as a law abiding

> citizen, and generally to prove his fitness to be accepted as a citizen of the United States." 2 *Gordon & Rosenfield, Immigration Law and Procedure*, pp. 15-14, 15-15 (1974).

Obviously, the five-year requirement of the Social Security Act was a requirement borrowed from the naturalization laws. But unlike naturalization, medicare requires no demonstration of good moral character, attachment, nor fitness to be a citizen.

(C)

THE UNCONSTITUTIONALITY OF THE DURATIONAL RESIDENCE REQUIREMENT

In *Graham v. Richardson*, 403 U.S. 365, 375, 376 (1971) this Court stated:

> "Since an alien as well as a citizen is a 'person' for equal protection purposes, a concern for fiscal integrity is no more compelling a justification for the questioned classification in these cases than it was in Shapiro.
>
> * * *
>
> "Accordingly we hold that a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years violate the Equal Protection Clause."

Dunn v. Blumstein, 405 U.S. 330 (1972) found the Tennessee one year durational voting residence requirement an impermissible classification.

Shapiro v. Thompson, 394 U.S. 618, 627, 638, 641 (1969) involved, *inter alia*, the one-year durational residence welfare requirement of the District of Columbia. This Court ruled that:

> "The interests which appellant assert are promoted by the classification either may not constitutionally be promoted by government or are not compelling governmental interests.
>
> * * *
>
> "Thus even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional.
>
> * * *
>
> "The waiting-period in the District of Columbia involved in No. 33 is also unconstitutional even though it was adopted by Congress as an exercise of federal power. In terms of federal power, the discrimination created by the one-year requirement violates the Due Process Clause of the Fifth Amendment."

Similiarly, it is clear that the discrimination between lawfully admitted aliens 65 years of age and over who have five years of residence and those who have not such length of residence is an irrational and unconstitutional classification which promote no compelling governmental interests.

CONCLUSION

For the reasons set forth herein, the judgment below should be affirmed.

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On Appeal from the United States District Court for the Southern District of Florida

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BRIEF FOR LEGAL SERVICES FOR THE ELDERLY POOR AS AMICUS CURIAE

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INTEREST OF THE AMICUS

Legal Services for the Elderly Poor is funded by the Office of Economic Opportunity to provide assistance on research and litigation to poverty lawyers dealing with the problems of the elderly. Statistics prepared by the Special Committee on Aging of the United States Senate indicate that about one-third of the more than 20 million persons aged 65 and older in the United States live in poverty; an additional one-tenth are on the poverty borderline. Legal Services for the Elderly Poor has a continuing concern with questions involving the administration of public assistance programs which deny the needy elderly the assistance necessary to sustain life at some level of decency.

Legal Services for the Elderly Poor has participated as co-counsel or amicus in numerous cases before this Court involving the elderly, including Graham v.

Richardson, 403 U.S. 365 (1971), Allied Chemical Workers v. Pittsburgh Plate Glass, 404 U.S. 107 (1971), and Ortwein v. Schwab, 410 U.S. 656, reh. den., 411 U.S. 922 (1973).

All parties have consented to the filing of this amicus brief. Copies of the consents are annexed.

ARGUMENT

1. 42 U.S.C. §1395 o(2)(A)(ii)* VIOLATES THE EQUAL PROTECTION ELEMENT OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

a. Classifications Based on Alienage Are Inherently Suspect and Can Be Justified Only by a Compelling Governmental Interest

This Court has firmly established the principle that classifications based on alienage, like those based on nationality or race, are inherently suspect. Graham v. Richardson, 403 U.S. 365, 372 (1971) (entitlement to public assistance); In Re

* Note at end of brief.

Griffiths, 413 U.S. 717, 721 (1973) (bar membership); Sugarman v. Dougall, 413 U.S. 634, 642 (1973) (municipal employment). Cases have uniformly held that legislation based upon a suspect classification "bears a heavy burden of justification." McLaughlin v. Florida, 379 U.S. 184, 196 (1964). See also Loving v. Virginia, 388 U.S. 1, 11 (1967). To meet this burden, the States have been required to show that the legislation furthers a "compelling" (or similarly characterized) governmental interest. See In Re Griffiths, supra, at 722, n. 9, for a discussion of the essential identity of the terms used to describe the required governmental interest when legislation carving out a suspect classification is at issue. In Graham v. Richardson, supra, this Court clearly indicated that the compelling governmental interest test is the proper

test to apply when a classification is based on alienage:

> "Since an alien as well as a citizen is a 'person' for equal protection purposes, a concern for fiscal integrity is no more compelling a justification for the questioned classification in these cases than it was in Shapiro." [at 375]

Other courts have followed Graham v. Richardson in requiring a showing of a compelling governmental interest when a classification based on alienage is at issue. See, e.g., Faruki v. Rogers, 349 F. Supp. 723, 727 (D.D.C. 1972) (durational citizenship requirement for foreign service held invalid); Miranda v. Nelson, 351 F. Supp. 735, 739 (D. Ariz. 1972), aff'd mem., 413 U.S. 902 (1973) (discharge based on alienage); Mohamed v. Parks, 352 F. Supp. 518 (D. Mass. 1973) (denial of municipal employment; also usurpation of exclusive Federal right to regulate immigration).

b. The Standards of Equal Protection Applicable to the States Through the Fourteenth Amendment Are Equally Applicable to the Federal Government Through the Fifth Amendment

It is well established that the due process clause of the Fifth Amendment contains equal protection standards to which the federal government must adhere. Bolling v. Sharpe, 347 U.S. 497 (1954); Harrow v. Washington, companion case to Shapiro v. Thompson, 394 U.S. 618 (1969), specifically so held. Various courts have interpreted the equal protection element of the due process clause of the Fifth Amendment as embodying the same standards as the equal protection clause of the Fourteenth Amendment for aliens as well as others. See, e.g., Nielsen v. Secretary of Treasury, 424 F.2d 833, 846 (D.C. Cir. 1970), where the court stated:

> "The courts stand ready to safeguard aliens against unreasonable discriminations, and to invoke the equal pro-

> tection clause of the Fourteenth Amendment as to actions by states, or the due process clause of the Fifth Amendment which provides equivalent safeguards against unreasonable action by the Federal Government."

Morris v. Richardson, 346 F. Supp. 494, 499 (N.D. Ga. 1972), stated the rule as follows:

> "All standards of equal protection applicable to the states through the Fourteenth Amendment are also applicable to the federal government through the Fifth Amendment. To rule otherwise would be totally illogical if not hypocritical."

It would, indeed, be illogical and hypocritical not to hold the federal government to the same standards of equal protection as are required of the state governments. Bolling v. Sharpe, supra, crystallizes this logic into compelling precedent. Although the justifications put forth by the federal government for its discriminatory actions may differ from those put forth by the states, there is no reason in logic or history why the

standards of equal protection should vary as between the federal government and the state governments, particularly when here, as in Graham v. Richardson, it is only benefits which are at stake. It is clear, therefore, that the statutory provision in question in this case, 42 U.S.C. §1395 o(2)(A)(ii), because it discriminates against aliens and thereby creates a suspect classification, must be held to be violative of Fifth Amendment's equal protection guarantee. The rationale is simple: "Aliens lawfully within this country have a right to reside in any of our states and may do so with assurance that the laws of this land will be applied to them on the same basis as they are applied to citizens." Mohamed v. Parks, supra, at 521.

c. The Alien Residency Requirement Does Not Promote a Compelling Governmental Interest, Nor Does It Even Serve a Rational Purpose

Appellant has put forth the justification that the alien residency requirement is necessary to insure the continued fiscal integrity of this supplemental benefits program. But, in directly and invidiously discriminating against aliens as a class, the alien residency requirement is not a constitutionally permissible method of attempting to insure fiscal integrity. Shapiro v. Thompson, supra, at 633: "The saving of welfare costs cannot be an independent ground for an invidious classification." Of course Graham v. Richardson, supra, and Sailer v. Leger, its companion case, jointly exclude this justification for an alien residency exclusion from benefits. See in particular 403 U.S. at 375.

Furthermore, as the court below found at 361 F. Supp. 12, the alien residency requirement is more likely to undermine than to promote the fiscal integrity of Medicare (Part B):

> "Thus, the residency requirement appears more likely to increase, rather than decrease, the costs of the supplemental medical insurance program, unless the rather morbid presumption is indulged that mortality among members of the class prior to the time that they become eligible will more than offset such increases."

If, as the appellant has asserted, another purpose of the alien residency requiements is to exclude certain "undeserving" aliens from participation in the supplemental medical insurance program, this residency requirement is a curious method for accomplishing such a purpose. First, as discussed more fully in Point II infra, the United States immigration laws, 8 U.S.C. §1101 et seq., already serve the purposes of regulating alien

entry into the United States and of excluding those aliens who might be considered "undeserving." It is as if one hand takes away what the other gives. The immigration laws define the individuals as "deserving," the Constitution here mandates their treatment as if they were citizens, and then suddenly Medicare (Part B) stigmatizes them as "undeserving."

Secondly, by excluding all aliens from participation in the Medicare (Part B) program for five years, and not just those aliens who prove "undeserving," the alien residency requirement creates a grossly overinclusive classification. It also creates an irrebuttable presumption that all aliens are "undeserving" of participation in this program for a period of five years. In Stanley v. Illinois, 405 U.S. 645 (1972), this Court held that an Illinois statute providing that children

of unmarried fathers, upon the death of the mother, are declared wards of the state without any hearing on parental fitness was violative of equal protection. Thus, the irrebuttable presumption of parental unfitness was struck down. This Court stated at 656-657 that proceeding by an irrebuttable presumption "is always cheaper and easier than individualized determination." But when, as here, "it needlessly risks running roughshod" over important individual interests, it cannot stand. The irrebuttable presumption of the "undeservedness" of all aliens for five years contained in the alien residency requirement works every bit as invidious a discrimination as does the irrebuttable presumption of the parental unfitness of unmarried fathers contained in the statute in Stanley. See, further on irrebuttable presumptions, Vlandis v.

Kline, 412 U.S. 441 (1973), and Cleveland Board of Education v. La Fleur, 39 L. Ed. 2d 52 (1974).

Finally, Medicare responds to categories of need, not to categories of moral judgment such as "undeserving" might define.

2. 42 U.S.C. §1395 o(2)(A)(ii) IS CONTRARY TO THE MANDATE OF 42 U.S.C. §1981 AND IS UNNECESSARY IN LIGHT OF THIS COUNTRY'S CAREFULLY DESIGNED IMMIGRATION LAWS

Title 42, section 1395 o(2)(A)(ii), of the United States Code, discriminates against a large group of aliens lawfully residing in this country. Such discrimination on the basis of alienage clearly contradicts 42 U.S.C. §1981, both as written and as interpreted. This section, which is entitled "Equal Rights Under the Law," provides in its relevant part that:

"All persons within the jurisdiction of the United States shall have the same rights...to the full and equal

benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens..."

It is long and well established that the "all persons" referred to in §1981 includes aliens. Yick Wo v. Hopkins, 118 U.S. 221 (1886), and Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948). Thus, it is impossible to reconcile the language of §1981 with the effect of §1395 o(2)(A)(ii), which is to deny medical care to a large group of people solely upon the basis of their status as aliens. The very purpose of §1981, and the national policy that it represents, are both ignored and undermined by §1395 o(2)(A)(ii). In discussing §1981 in Takahashi v. Fish and Game Commission, supra, this Court stated at 420:

> "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws."

This conclusion is well supported by the legislative history of §1981, for the term "all persons" was substituted for "all citizens" when the original 1866 legislation was amended in 1870. For a thorough discussion of the history and purpose of this section, see further, Guerra v. Manchester Terminal Corp., 350 F. Supp. 529, 533-536 (S.D. Tex. 1972).

Thus §1395 o(2)(A)(ii) stands in contradiction to the national policy espoused in §1981. Furthermore, it does so totally unnecessarily. As was discussed in Point 1-c, concern for the national fisc cannot justify the type of discrimination present here. Neither can §1395 o(2)(A)(ii) stand as a justifiable means for withholding the benefits of Medicare (Part B) from undeserving aliens. Not only is the statute overbroad for this purpose; it is also misplaced in time and location. The immigration laws of this country, found in

Title 8, Chapter 12, of the United States Code, are quite adequately designed to prevent any influx of aliens coming to this country solely to receive various public welfare benefits. 8 U.S.C. §1182 (a)(15) provides that any alien can be denied admission to the United States if he is likely at any time to become a public charge. Furthermore, an alien can be deported if within five years after his entry into this country he becomes a public charge for reasons not affirmatively shown to have arisen after his entry (8 U.S.C. §1251 (a)(8)).[1] Certainly, these provisions more than adequately protect against a wholesale invasion of the United States by aliens who seek nothing but public welfare benefits. Therefore, 42 U.S.C. §1395 o(2)(A)(ii) is an unnecessary, as well as overbroad, provision. It is in

1. While it is true that some aliens may be paroled into the country without meeting the normal admissions standards (§1182 (d)(5)), such parolees may apply for perma-

fact a sad commentary on the state of this country's self-image if laws must be drafted on the premise that aliens no longer come to our shores seeking equality and opportunity, but only a woefully small welfare check. The immigration laws and department were established to deal with immigrants, aliens, and naturalization. The Medicare law was established to help the impoverished with their medical expenses. Nothing in its nature, history or purpose can justify its incursion into the field of immigration; and by excluding needy aliens it frustrates rather than furthers the purpose of the statutory scheme.

(1.con't) nent residence status after two years (80 Stat. 1161 (1966) amending 8 U.S.C. 1255(c)(1964)), at which time they must presumably meet the normal admissions standards.

3. 42 U.S.C. §1395 o(2)(A)(ii) IS CONTRARY TO THE INTERNATIONAL POLICY OF THE UNITED STATES EXPRESSED IN ITS TREATIES WITH THE UNITED NATIONS AND THE ORGANIZATION OF AMERICAN STATES

Following World War Two, this nation, in concert with many others, became signatory to the United Nations Charter, 59 Stat. 1031. Chapter 1, Article 1, Subparagraph (2) of that charter states in part:

> "The purposes of the United Nations are:...
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples..."

Further, our country is signatory to the Charter of the Organization of American States, 2 U.S.T. 2394 (1951), which provides in relevant part:

Chapter VII

Social Standards

Article 28

> The Member States agree to cooperate with one another to achieve just and decent living conditions for their

entire populations.

Article 29

> The Member States agree upon the desirability of developing their social legislation on the following bases:
> a) All human beings, without distinction as to race, nationality, sex, creed or social condition, have the right to attain material well-being and spiritual growth under circumstances of liberty, dignity, equality of opportunity, and economic security;
> b) Work is a right and a social duty; it shall not be considered as an article of commerce; it demands respect for freedom of association and for the dignity of the worker; and it is to be performed under conditions that ensure life, health and a decent standard of living, both during old age, or when any circumstance deprives the individual of the possibility of working.

Certainly §1395 o(2)(A)(ii) is inconsistent with the principles expressed in the above charters. And the effect of those principles on our national policies should not be taken lightly. As Justices Black and Douglas stated in a concurring opinion in Oyama v. California, 332 U.S. 632, 649-50 (1948):

> "There are additional reasons now why that law stands as an obstacle to the free accomplishment of our policy in the international field. One of these reasons is that we have recently pledged ourselves to cooperate with the United Nations to 'promote...univeral respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.' How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?"

The very same question might well be asked with respect to discriminatory federal laws, for they represent a far broader manifestation of infidelity to our international pledges. The same party to the treaty promulgates actions counter to it.

Thus, invalidation of 42 U.S.C. §1395 o(2)(A)(ii) would strengthen our relationship with all foreign nations, improve our image in the weaker countries, especially those of Latin America, and reinforce the meaning of the inscription

on the pedestal of the Statue of Liberty:

> "Give me your tired, your poor,
> Your huddled masses yearning to be free,
> The wretched refuse of your teeming shore.
> Send these, the homeless, tempest-tost to me.
> I lift my lamp beside the golden door!"
>
> --Emma Lazarus

CONCLUSION

For all of the foregoing reasons, the judgment of the District Court should be affirmed.

Dated: September 30, 1974

Respectfully submitted,

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* This section is substantially the same as the present §1395 o(2)(B) which replaced this section October 30, 1972. The law suit was commenced prior to that date.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1974

No. 73-1046

CASPAR W. WEINBERGER, Secretary of the Department of Health, Education and Welfare of the United States,

Appellant,

v.

SANTIAGO DIAZ, JOSE A. CLARA and VICTOR CARLOS ESPINOSA, et al.,

Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

BRIEF FOR AMICI CURIAE

MIGRATION AND REFUGEE SERVICES, U.S. CATHOLIC CONFERENCE, INC.; LUTHERAN IMMIGRATION AND REFUGEE SERVICE, LUTHERAN COUNCIL IN THE U.S.A.; AMERICAN COUNCIL FOR NATIONALITIES SERVICE; CHURCH WORLD SERVICE, INC.; UNITED HIAS SERVICE, INC.; INTERNATIONAL RESCUE COMMITTEE, INC.; TOLSTOY FOUNDATION, INC.; AMERICAN FUND FOR CZECHOSLOVAK REFUGEES, INC.; TRAVELERS AID-INTERNATIONAL SOCIAL SERVICE OF AMERICA, INC.; AMERICAN CIVIC ASSOCIATION, INC., BINGHAMTON, N.Y.; INTERNATIONAL INSTITUTES OF JERSEY CITY, N.J., MINNESOTA, OAKLAND, CAL., and BUFFALO, N.Y.; TRAVELERS AID SOCIETY OF METROPOLITAN CHICAGO, incorporating IMMIGRANT'S SERVICE LEAGUE; THE AMERICAN COUNCIL FOR JUDAISM PHILANTHROPIC FUND, INC.

Amici Curiae.

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CASPAR W. WEINBERGER, Secretary of the Department of Health, Education and Welfare of the United States,

Appellant,

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Amici Curiae

The above-named agencies, as *amici curiae*, file this brief pursuant to the Court's Rule 42 and upon the written consent of the parties. The agencies, representing religious, nationality, nonsectarian, welfare, and immigration interests in the United States, have for years participated in relief and rehabilitation programs in foreign countries and have also participated in immigration and resettlement services to refugees in the United States. Some of the organizations have affiliates on the local and area levels throughout the United States, others work through parishes and churches. These organizations consider it their responsibility to eliminate all forms of discrimination, including discrimination against non-citizens residing in the United States and they are devoted to achieving the practical discharge of that responsibility in every appropriate manner. This brief is filed to urge the Court to affirm the decision of the Court below (361 F. Supp. 1, 1973).

Most of the organizations that join as *amici* in this brief had also appeared as *amici* in *Sailer et al. v. Leger et al.*, the companion case to *Graham v. Richardson*, 403 U.S. 365 (1971). They have joined again because they believe that the same principle involved in the *Graham* and *Sailer* cases is even more compelling in the *Diaz et al.* case now before this Court

Graham and *Sailer* raised the issue whether residence or citizenship should determine the right to welfare or whether denial of that right on the ground of alienage is in violation of the Equal Protection clause of the Fourteenth Amendment. This Court ruled that the rights involved there were abrogated by the States in violation of the United States Constitution.

In *Weinberger v. Diaz* the rights of the appellees are abrogated by Federal Statute.

As stated by the Court below:

> Although we cannot say that Congress may never be held to a lesser constitutional standard than the states, *but see Morris v. Richardson, supra* at 499, neither can we accept the view that Congress may never be held to the same standard. For example, to differentiate between citizens and aliens in regulating entry into the United States may be a presumptively proper exercise of Congressional power, whereas a like discrimination by legislatures regulating entry into the states would not: different fourteenth and fifth amendment constitutional tests might therefore be appropriate. *Cf. Graham v. Richardson, supra; Shapiro v. Thompson, supra.*

The rights at issue before this Court are of significance equal to those in the *Graham* case. The right to medical attention is basic and while only comparatively recently the United States has enacted legislation which guarantees health care to most of its population, it is believed that the denial of health care on the ground of alienage would be an unconstitutional deprivation of a vital right under the due process clause of the Fifth Amendment of the Constitution.

FACTS

The essential facts are not at issue. Two of the appellees, Diaz and Clara, are Cuban refugees, paroled into the United States by the Attorney General, pursuant to 8 USC 1182(d)(5), (Sec.212(d)(5) I&NA). They have reached the age of 65, but have not yet become permanent residents within the meaning of the Immigration and Nationality Act, nor have they fulfilled the five year residence requirement.

Appellee Espinosa is a lawful permanent resident, has reached the age of 65, but has not yet resided in the United States for five years or more. All appellees, in the opinion of the Health, Education and Welfare Administration, do not qualify for the supplemental medical insurance program under Section 1836 (2)(A)(ii) of the Social Security Act of 1935, as amended (42 U.S.C. 1395o(2)(B).

ARGUMENT

I

The statutory five year durational residence requirement for resident aliens to be eligible for supplementary medical insurance benefits for the aged (42 USC §1395o) is a denial of equal protection of the laws in violation of the Fifth Amendment.

The Court below correctly held that the five year durational residence requirement imposed on resident aliens in order to be eligible for the supplementary medical insurance benefits for the aged constitutes an invidious discrimination against resident aliens who lack five years residence and is a denial of equal protection of the law required in statutes enacted by Congress by the command of the due process clause of the Fifth Amendment. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964); *Bolling v. Sharpe*, 347 U.S. 497 (1954) at 499.

In *Shapiro v. Thompson supra* this Court concluded its opinion stating succinctly:

> "For the reasons we have stated in invalidating the Pennsylvania and Connecticut provisions, the District of Columbia provision is also invalid – the Due Process Clause of the Fifth Amendment prohibits Congress from denying public assistance to poor persons otherwise eligible solely on the ground that they have not been residents of the District of Columbia for one year at the time their applications are filed." (at 642)

In respect of discrimination against resident aliens by a durational residence requirement in the granting of welfare, medical or similar public benefits the decision of the Court below was virtually required by this Court's decision in *Graham v. Richardson*, 403 U.S. 365, holding unconstitutional state statutes conditioning welfare benefits upon citizenship or in

the case of resident aliens upon durational residence requirements. This Court pointed out that its prior decisions "have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny" and concluded that the desire to preserve limited welfare benefits for citizens and long time resident aliens was an inadequate justification for the discrimination and

> "that a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years violates the Equal Protection Clause."

We submit that the *Graham* decision combined with the reasoning of this Court in *Shapiro v. Thompson, supra* leads to the conclusion that this Court has in effect adjudicated the problems raised in the present case. Moreover the decisions in *Sugarman v. Dougall*, 413 U.S. 634 (1973) and in *Re Griffiths*, 413 U.S. 717 (1973) have consistently reaffirmed this Court's position and are controlling here.

The Government mistakenly argues that the concededly broad constitutional power of Congress to control admission and deportation of aliens, *Harisiades v. Shaughnessy*, 342 U.S. 580, *Galvan v. Press*, 347 U.S. 522 (1954), and the consequences of deportation, *Flemming v. Nestor*, 363 U.S. 603 (1960), in some unexplained way enlarges the power of Congress to impose discriminatory controls on resident aliens as members of the general population in respects wholly unrelated to exclusion or deportation from the country but rather related to public service programs offered to segments of the population generally – in this case supplemental medical benefits to residents over 65 years of age. The Government argues that the equal protection requirement of the due process clause of the Fifth Amendment does not give alien residents as members of our community the protection which

this Court has found is granted them by the Fourteenth amendment from state action.[1]

This sweeping generalization must be rejected on the basis of past precedent which supports the following reasoning:

1. The special and extensive power of Congress, as the legislative branch of the sovereign nation, to control admission and deportation of aliens cannot be carried over into a power to discriminate against resident aliens by withholding benefits offered to the rest of the population and unrelated to the power of exclusion and deportation.

2. Accepting the Government's position would shatter a fundamental concept of our society that apart from being subject to deportation for specific conduct provided by statute, alien residents are members of the social community living under the protection of the United States Constitution and the Bill of Rights. It would lead to what we believe is an absurd suggestion, namely, that Congress, if it felt like it, could pass legislation requiring that all aliens, regardless of any accrued rights and legal status leave the country.[2] Such reasoning would throw in doubt

1. We do not question the authority of Congress to regulate the *admission* of aliens by creating different categories that are subject to different "conditions of admission." *Vide* the numerous classes of "non-immigrants" found in §101(a)(15) INA most of which are permitted to remain in the U.S. for definite and usually short periods of time only and who prior to visa issuance must establish to the satisfaction of the consular officer that they have a residence in a foreign country which they have no intention of abandoning.

We do not believe that the Federal statutes enumerated in the Government's brief, filed in *Hampton v. Wong*, No. 73-1596, establish that aliens have a different status from citizens except in matters of national security and foreign policy. It is in fact possible that several of the statutes enumerated, if they were attacked, might be found unconstitutional by this Court. See: *Cabrera v. Butz*, D.P.R., Civ. No. 326.

2. Appellee's brief in *Hampton v. Mow Sun Wong*, No. 73-1596 at p. 13. We believe that the issues raised before this Court in that case which is footnoted in appellee's brief in the instant case (p. 15, fn. 13), are not relevant to the present case. The issue of right to Federal employment, at least with regard to policy-making positions, can be differentiated and should not be confused with the issues in *Diaz*, regardless of the outcome of the *Hampton* case.

the authority of a long line of decisions of this Court beginning at least with *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) through *Truax v. Raich*, 239 U.S. 33, and *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 to *Graham v. Richardson supra* and *Sugarman v. Dougall*, 413 U.S. 634, establishing that resident aliens have been accepted as members of the community, protected by all constitutional provisions against discrimination or denial of due process of law in dealing with all branches of the Government, federal, state, local and legislative, executive and judicial. Acceptance of the Government's position would cast doubt where none should exist on the limitations on Congress in respect of a constitutional mandate of equal protection and due process of law.

3. It is desirable for the social stability of our nation which is proud of its heritage derived from immigrants and the children of immigrants, that resident aliens should be accepted completely and not set apart as a group, subject to different and discriminatory treatment and separate laws.

Naturalization has always been reserved for those who, of their free will and desire, wish to establish absolute allegiance to the United States, foregoing any ties to the past. This should not be changed in effect to the requirement that the acquisition of citizenship is the only protection against discriminatory treatment by government agencies. Such a solution would downgrade the naturalization process which is and always has been a meaningful experience to the naturalized citizen.

For the reasons stated and on the authority of this Court's decisions particularly in *Shapiro v. Thompson* and *Graham v. Richardson, supra*, the opinion of the Court below should be confirmed in all respects.

II

If severable, the statutory requirement that alien residents be "lawfully admitted for permanent residence" is discriminatory and unconstitutional.

The Government argues that the statutory requirement that alien residents be "lawfully admitted for permanent residence" to be eligible for the benefits of 42 U.S.C. (Supp. II) 1395o(2)(B), is a valid discrimination against the many alien residents of the United States that are technically not admitted for permanent residence, but are in fact permanent residents, known to the authorities.

The Court below recognizes the existence of this class by certifying as a subclass the appellee Cubans who were paroled into the United States under §212(d)(5) INA (8 U.S.C. 1182 (d)(5)) and who are required under the law (The Act of November 2, 1966 (P.L.89-732, 80 Stat. 1161)) to wait two years in the United States before they become eligible to apply for permanent residence. It should be noted that once their application is granted there is an additional waiting period of approximately two years before they can achieve permanent residence in a legal sense because of the back-up of Western Hemisphere applicants who need a number under the numerical ceiling placed upon Western Hemisphere immigration.

The Court below recognized the right of Appellee *Espinosa* to sue as a class and certified the class as consisting of:

> "All immigrants residing in the United States who have attained the age of 65 and who have been or will be denied enrollment in the supplemental medical insurance program under Medicare, 42 U.S.C. sec.1395o *et seq.* (1970), because they are not aliens, lawfully admitted for permanent residence who have resided in the United States continuously during the five years immediately preceding the month in which they apply for enrollment as required by 42 U.S.C. sec.1395o(a)(A)(ii) (1970)."

The Court below certified a subclass as follows:

> "All immigrants lawfully admitted for permanent residence in the United States who have attained the age of 65 and who have been or will be denied enrollment in the supplemental medical insurance program under Medicare, 42 U.S.C. sec. 1395j *et seq.* (1970), solely because of their failure to meet the five-year continuous residency requirement of 42 U.S.C. sec. 1395o(2)(A)(ii)(1970)."

The Court below correctly held that the requirement of admission for permanent residence is not separable from the requirement of five years permanent residence and that therefore both of these requirements for alien residents to participate in the supplemental medical program are unconstitutional. The statute should be administered as if it read that those eligible for the program are residents of the United States without reference to the following qualifications that they be either citizens or aliens admitted for permanent residence with five years permanent residence.

If, however, this Court determines that the admission requirement is separate and severable and requires a separate determination of constitutionality then it is submitted that the admission requirement also is a denial of equal protection of the laws because it discriminates arbitrarily against several classes of permanent resident aliens not technically admitted for permanent residence under the Immigration and Nationality Act.

Prominent in that group are the appellees *Diaz* and *Clara*, Cuban parolees who have been recognized as a "subclass" eligible to sue. They are not unique. In 1956 more than 30,000 Hungarians were admitted under the same procedure. In 1958 they were permitted to apply for permanent residence under special legislation. (The Act of July 25, 1958, P.L. 85-559; 8 U.S.C. 1182, note.) Other persons who are permanent residents and integrated members of the American

community are refugees that were granted stays of deportation under §243(h) INA (8 U.S.C. 1253(h)), persons eligible to adjust status under the proviso of §203(a)(7) INA (8 U.S.C. 1153(a)(7)), long term residents who are eligible for suspension of deportation, §244 INA (8 U.S.C. 1254) and some lawful long term residents with working permits who are technically nonimmigrants but have been lawfully in the United States for many years.

Such persons are treated as permanent residents in all respects, including the obligation to pay income and social security taxes as well as military obligations. It is arbitrary for Congress to make them eligible for some social security bene fits and deny them the supplemental medical assistance here involved. The question arises whether it is actually necessary to use the definition of "lawful permanent resident" as it is defined by the Immigration and Nationality Act. Among the many government agencies which do not always do that is the Appellant himself.

In 1972 the Social Security Act was amended (P.L. 92-603) and for the first time it was required that applicants for social security cards had to reveal their immigration or citizenship status to avoid issuance of social security cards to persons not permitted to work under the I&NA. The 1970 amendment, among other things, provided that the Secretary of Health, Education and Welfare should issue social security cards.

> "(I) to aliens at the time of their lawful admission to the United States either for permanent residence or under other authority of law, permitting them to engage in employment in the United States and to other aliens at such time as their status is so changed as to make it lawful for them to engage in such employment." (sec. 205(b)(i) as amended by P.L. 92-603, 92nd Congress, H.R. 1, October 30, 1972).

In implementing the provision of the statute the Social Security Administration quickly found that in addition to lawful permanent residents within the limited technical definition are aliens who, for various reasons, either of law or of administrative interpretation of law, are permitted to remain in the United States for an indefinite period of time and are authorized to work, but who do not fall within the definition of "immigrant" as defined by the Court in its footnote 8.

On October 30, 1972 an amendment to sec.205(c)(2) of the Social Security Act provided that:

> "(B)(i) In carrying out his duties under subparagraph (A), the Secretary shall take affirmative measures to assure that social security account numbers will, to the maximum extent practicable, be assigned to all members of approximate groups or categories of individuals by assigning such numbers (or ascertaining that such numbers have already been assigned):
>
> "(I) to aliens at the time of their lawful admission to the United States either for permanent residence or under other authority of law permitting them to engage in employment in the United States and to other aliens at such time as their status is so changed as to make it lawful for them to engage in such employment;"

The Social Security Act recognizes that not only permanent resident aliens, but other aliens may be entitled to work, and enter the Social Security system including the obligation to pay Social Security contributions which are substantial. It is only reasonable that persons who are obligated to pay into it, should also benefit from the Social Security laws to the fullest extent.

On March 19, 1974 the Social Security Administration issued regulations implementing the statute. The regulations (20 C.F.R. sec.105(d), as amended March 19, 1974; 39 *Fed.*

Reg. No. 54, pp. 10238-10242) require that aliens who apply for a Social Security number must submit to the Social Security office issuing the number an Alien Registration Receipt Card (Form I-151) or an Arrival-Departure Record (Form I-94), at which time the official in the Social Security office must determine whether the type of nonimmigrant characterized in Form I-94 is authorized to work.

In view of the fact that there are many categories of aliens authorized by law to work in addition to the permanent residents, and are obligated by law to pay social security, a proper determination as to which of these aliens should be given Social Security cards would burden clerks, handling the issuance of the cards with the need for expert knowledge of the Immigration and Nationality Act. Recognizing that fact and on the basis of the representations made in connection with a proposed rule making, the Administration inserted sec. 42.104a in the finalized regulations as follows:

> *Sec. 42.104a Presumption of authority of nonimmigrant alien to accept employment* – "The nonimmigrant visa classifications assigned by the Department of State shall be used to determine whether a nonimmigrant alien is authorized to engage in employment. (See 22 CFR 41.12 for these classifications.) Permission to engage in employment shall not be presumed in the cases of an alien who has not been issued a visa or whose visa shows any one of the following classification symbols: B-1, B-2, B-1 and B-2, C-1, C-2, C-3, F-2, H-4, and L-2. Holders of visas bearing other classifications will be presumed to have authorization to work."

Thus it may be seen that the same agency that is the appellant in this case, in connection with another one of its functions, found it impossible to use the definition of "immigrant" interchangeably with the technical definition of "permanent resident" as found in the Immigration and Nationality Act to define the group entitled to the use of Social Security cards.

The Court below recognizes this in its Footnote 18 pointing to a recent amendment of the Social Security Act which makes benefits available to an otherwise qualified individual who is

> "either (i) a citizen or (ii) an alien lawfully admitted for permanent residence or otherwise *permanently residing in the United States under color of law* (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) [conditional entry] or section 212(d)(5) [parole] of the Immigration and Nationality Act). 42 U.S.C. §1382c (a)(1)(B) (Supp. II, 1973) (emphasis added).

We believe that the above definition of "lawful permanent resident" is in the spirit of the United States Constitution and the American history which has always been to welcome the newcomer with open arms, because this is a country of immigrants, many of whom arrived long before immigration restrictions existed and all of whom have been proud of their origins and sympathetic with those who came later because their parents were not as venturesome.

The Court below in its "Conclusion" expressed doubt as to the constitutionality of the permanent residence requirement but felt that it was not necessary to make a finding on it. We agree with the Court in that respect and also with its conclusion that

> "to the extent this nation continues to hold out a promise of refuge to victims of political and natural misfortune, the Constitution requires that we accept them to reside here on an equal basis with citizens."

CONCLUSION

Whereby it is respectfully prayed that the decision of the Court below be affirmed.

Respectfully submitted,

Migration and Refugee Services, U.S. Catholic Conference, Inc.

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United Hias Service, Inc.

International Rescue Committee, Inc.

Tolstoy Foundation, Inc.

American Fund for Czechoslovak Refugees, Inc.

Travelers Aid-International Social Service of America, Inc.

American Civic Association, Inc., Binghamton, N.Y.

International Institutes of Jersey City, N.J. Minnesota, Oakland, Cal., and Buffalo, N.Y.

Travelers Aid Society of Metropolitan Chicago, incorporating Immigrant's Service League

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IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1046

CASPER W. WEINBERGER,
Secretary of Health, Education and Welfare,

Appellant,

—v.—

SANTIAGO DIAZ, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1974

No. 73-1046

CASPER W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Appellant

-v.-

SANTIAGO DIAZ, ET AL,

Appellees

On Appeal from the United States District Court for the Southern District of Florida

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

The American Civil Liberties Union files this brief pursuant to Rule 42 of the Rules of the Supreme Court of the United States. Both parties have consented to the filing of this brief. Copies of the consents have been filed with the Clerk of this Court.

INTEREST OF AMICUS

The American Civil Liberties Union is a nationwide non-partisan organization of over 250,000 members devoted solely to the protection of the liberties safeguarded by the Bill of Rights. In its fifty-four year existence the ACLU has been particularly concerned with the right of aliens to enjoy the full protection of our Constitution. The ACLU has participated in numerous cases in this and other courts to challenge deprivations imposed upon non-citizens. The Union is also deeply concerned with laws that impose invidious discriminations upon distinct classes in our society, and believes that such invidious discriminations are no less violative of the Constitution when imposed by the United States than when imposed by the individual states. For these reasons we file this brief to urge affirmance of the judgment of the District Court, 361 F.Supp.1.

ARGUMENT

I.

The Discriminatory Treatment of Aliens with Respect to Eligibility for Enrollment in the Supplemental Medical Insurance Plan Is Clearly Violative of the Fifth Amendment's Guarantee of Due Process of Law.

In Graham v. Richardson, 403 U.S. 365 (1971), this Court held that the discriminatory treatment of aliens with respect to eligibility for state public assistance,

specifically a requirement of durational residence that was not imposed on citizens, was violative of the Fourteenth Amendment's guarantee of equal protection of the laws. Likewise, in Sugarman v. Dougall, 413 U.S. 634 (1973), and In re Griffiths, 413 U.S. 717 (1973), it held that the states could not constitutionally bar resident aliens from public employment or from admission to the bar. As in Bolling v. Sharpe, 347 U.S. 497, 500 (1953), "[i]t would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." If a classification is invalid under the equal protection clause of the Fourteenth Amendment, it is also inconsistent with the due process requirements of the Fifth Amendment. Johnson v. Robison, ___U.S.___, 94 S. Ct. 1160, 1164 n. 4 (1974). If the states cannot constitutionally discriminate against aliens with respect to eligibility for public assistance by imposing durational residence requirements that were not imposed on citizens, the federal government cannot do so either.

But this is precisely what the government is arguing in seeking to overturn the judgment of the District Court in the case at bar. Heedless of this Court's clear pronouncement it has "now rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or a 'privilege,'" Graham v. Richardson, supra, at p. 374, the government argues that its "plenary power over immigration

and naturalization" entitles it to treat the receipt of supplemental medical insurance benefits by aliens as a "privilege" somehow related to "the conditions under which aliens are to be permitted to enter and remain in this country," and to require that an alien demonstrate "some substantial and enduring connection with the United States" in order to receive this benefit. This being so, the government reasons, the discriminatory treatment of aliens with respect to eligibility for a social welfare benefit is constitutional when practiced by the federal government, although similar discriminatory treatment would be unconstitutional when practiced by the states.

In support of this contention the government further argues that classifications based on alienage when made by the federal government, as opposed to the states, are not inherently suspect, so that they are not subject to the strict scrutiny of the compelling governmental interest standard, but may be upheld if they satisfy the less exacting rational basis standard. The District Court found it unnecessary to decide whether the discrimination effected here should be evaluated under the compelling governmental interest standard or the rational basis standard, since it found that no rational basis whatsoever for such discrimination could be shown. While we would agree that the discrimination here cannot be sustained under the rational basis standard, we believe that it is particularly important for this Court to

make clear that classifications on the basis of alienage are no less inherently suspect when made by the federal government than when made by the states, and that such classifications are in all circumstances to be subject to the strict scrutiny of the compelling governmental interest standard, as a number of lower federal courts have held. See e.g., Mow Sun Wong v. Hampton, ___F.2d ___, No. 72-1079 (9th Cir. 1974), cert. granted sub.nom. Hampton v. Mow Sun Wong, No. 73-1956, this Term; Jalil v. Hampton, 460 F.2d 923 (D.C. Cir.), cert. denied, 409 U.S. 887 (1972); Ramos v. United States Civil Service Commission, 376 F. Supp. 361 (D.P.R. 1974).

The reason that classifications on the basis of alienage are inherently suspect goes to the nature of the classification and has nothing to do with whether it is made by the federal government or by the states. As this Court stated in Graham v. Richardson, supra, at p. 372:

> But the Court's decisions have established that classifications based on alienage, like those based on nationality or race are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority ... for whom such heightened judicial solicitude is appropriate.

They are no less a 'discrete and insular'

minority when it is the federal government that is making the classification. The difference between classification by the states and by the federal government in no sense can relate to the suspect nature of the classification. Its relevance, if at all, appears only with respect to the compelling nature of the interest that is purportedly advanced by the classification, that is, the federal government's classification is tested by whether it advances a compelling federal interest. C.f. Nielson v. Secretary of Treasury, 424 F.2d 833 (D.C. Cir. 1970). As was observed in Jalil v. Hampton, supra, at p. 929, "The federal government has interests different from those applicable to the states, but nonetheless, it must demonstrate that its interest justify the discrimination against aliens." Or, as the Court stated in Ramos v. United States Civil Service Commission, supra, at p. 366:

> We conclude that Congress itself, when legislating generally on matters not related to the furtherance of its naturalization responsibilities, may not single out aliens for discriminatory treatment forbidden to the states. Any other result would lead to a peculiar hierarchy of rules, in which the federal government would enjoy a license to engage in practices condemned by the courts as unfair and discriminatory when done by the states.

This Court should make it clear that classifications on the basis of alienage when made by the federal government, no less than when made by the states, are "inherently suspect" and must be subject to the close judicial scrutiny of the compelling governmental interest standard.

The District Court considered all possible justifications for the discriminatory treatment of aliens with respect to eligibility for supplemental medical insurance under the less restrictive rational basis test and found them wanting. The sole basis for the discriminatory treatment that the government now appears to be advancing is that it was "rational" for the Congress to impose the five year durational residence requirement because this would insure that the alien receiving such benefits had a "substantial and enduring connection with the United States," and therefore, was a proper recipient of this "privilege of citizenship." The government also argues that the rationality of social welfare legislation is subject to "limited judicial scrutiny," a proposition that is clearly untenable when the denial of benefits to a particular group of persons otherwise in need of the benefit is not reasonably related to the accomplishment of a legitimate governmental interest. Jiminez v. Weinberger, ___U.S. ___, 94 S. Ct. 2496 (1974). There is no correlation whatsoever, even under the rational basis standard, between an alien's "substantial and enduring connection" with the United States and his

need for supplemental medical insurance benefits. In short the government, when it talks about the "unique legal status" of aliens, is saying nothing more than that the receipt of welfare benefits by aliens from the federal government is a "privilege," to be subject to any conditions that the government wishes to impose. Such reasoning was thoroughly rejected by this Court in Graham v. Richardson, supra, and the government has not shown in any way how the discrimination effected against aliens by the durational residence requirement advances a legitimate, let alone a compelling governmental interest. The discrimination between persons in equal need of the governmental benefit is as irrational as that condemned by this Court in Jiminez v. Weinberger, supra, and its irrationality is invidiously compounded by the fact that it is directed against a "discrete and insular" minority solely because of their status. If the states cannot impose durational residence requirements for welfare benefits on the basis of alienage, and if, as this Court has held, invidious discrimination is prohibited by the Fifth Amendment's due process clause in the same manner as by the Fourteenth Amendment's equal protection clause, Bolling v. Sharpe, supra, Johnson v. Robison, supra, the federal government likewise cannot impose durational residence requirements on the basis of alienage for the welfare benefits it provides.

II.

The Holding of the District Court to the Effect That the "Lawfully Admitted For Permanent Residence" Requirement Is Not Severable from the Durational Residence Requirement Should Be Affirmed, Particularly Since the Exclusion of All Aliens Other Than Those Admitted for Permanent Residence from the Supplemental Medical Insurance Plan Would Raise Serious Constitutional Questions.

The District Court based its holding on the question of non-severability on the fact that the report of the House delegation to the conference committee revealed that unification of the two residency elements was an integral part of the larger compromise necessary to the final passage of the 1965 Medicare Amendments. 361 F. Supp. at 15. The government argues that this was erroneous because the "lawfully admitted" requirement was contained in both bills. As the District Court recognized, "reasonable men might differ" on the question of non-severability. Id. at 15-16. We would submit that in the particular circumstances of this case the holding of the District Court on this score should be affirmed because the exclusion of all aliens other than those admitted for permanent residence from the supplemental medical insurance plan would raise serious constitutional questions.

The exclusion of aliens such as the ap-

pellees Diaz and Clara from the supplemental medical insurance plan solely because they have not been admitted for permanent residence may create invidious discrimination between classes of aliens whose need for the benefit is the same. Cf. Jiminez v. Weinberger, supra. The government argues that the requirement that an alien be "lawfully admitted for permanent residence" is rationally calculated to exclude from eligibility illegal entrants or other potentially long-term residents, such as diplomats and foreign correspondents, who lack a substantial and enduring tie to the United States. If this is the purpose, the exclusion is overbroad because it includes within its sweep aliens like those appellees who are permanently residing in the United States under color of law, but who have been admitted on a basis other than "permanent residence." These aliens are by the terms of their admission entitled to stay indefinitely in the same manner as those admitted for permanent residence, and it is difficult to find a rational basis for the differential treatment of these persons with respect to eligibility for a governmental welfare benefit. These appellees contended below that the "lawfully admitted for permanent residence" requirement was unconstitutional because it created invidious discrimination between classes of aliens, but the District Court found it unnecessary to reach this issue in view of its holding as to non-severability. The serious constitutional questions that would be presented if the "lawfully admitted for permanent residence" requirement were held severable from the durational residence requirement justifies resolving all doubts in favor of the District Court's finding of non-severability.

This is especially so, since Congress would then be free to enact new requirements with respect to eligibility and could then decide whether, as it has not done in more recent welfare legislation, it wanted to limit the benefits only to those aliens who had been admitted for permanent residence. As the District Court noted, 361 F. Supp. at 14 n. 18, the most recent expression of the will of Congress on the issue of the eligibility of aliens for welfare benefits makes special provision for parolees and conditional entrants to insure their eligibility for aid to the aged, blind and disabled. Benefits are made available to an otherwise qualified individual who is "either (i) a citizen or (ii) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) [conditional entry] or section 212(d)(5) [parole] of the Immigration and Nationality Act." 42 U.S.C. § 1382c(a)(1)(B) (Supp. II, 1973)(emphasis added). Such a provision necessarily excludes illegal entrants and diplomats or foreign correspondents, which is supposedly the reason for the "lawfully admitted for per-

manent residence" requirement of the present statute. Congress can then make its wishes more definitively known with respect to the inclusion of "other permanent residents" in the supplemental medical insurance program. It may also take a different view of limiting inclusion to aliens admitted for permanent residence if the durational residence requirement is invalidated. All of these reasons militate in favor of upholding the District Court's ruling on the question of non-severability.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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